Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

AUTO STIEGLER, INC.,

Petitioner,

v.

ALEXANDER M. LITTLE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts the Supreme Court of California's blanket rule that all employers must always pay all arbitration forum costs in matters involving state law claims of wrongful termination in violation of public policy?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Auto Stiegler, Inc. is a privately held corporation. Auto Stiegler, Inc. is unaware of any publicly traded company owning 10 percent or more of its stock.

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OPINIONS BELOW

The February 27, 2003, decision of the Supreme Court of California is reported at 29 Cal. 4th 1064, 63 P.3d 979, 130 Cal. Rptr. 2d 892 and is reprinted at App. 1a - 46a. The September 17, 2001, decision of the Court of Appeal of California, Second Appellate District, Division Five, is reported at 92 Cal. App. 4th 329, 112 Cal. Rptr. 2d 56 and is reprinted at App. 47a - 63a. The November 2, 2000, unpublished minute order of the Superior Court of California, County of Los Angeles, is reprinted at App. 64a - 68a. The transcript of the hearing held on August 7, 2000, in the Superior Court of California, County of Los Angeles, is reprinted at App. 69a - 84a.

STATEMENT OF JURISDICTION

The Supreme Court of California issued its decision on February 27, 2003. This petition for certiorari is timely in that Petitioner has filed it within 90 days of February 27, 2003. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (1994), provides in relevant part:

> § 1 "[C]ommerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
>
> § 2 A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The California Arbitration Act, § 1284.2 provides:

> Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with

other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit.

STATEMENT OF THE CASE

The Court is asked to strike down a state court created obstacle to arbitration of employment claims that is preempted by the FAA.

I. Overview of the case.

Though the parties' arbitration agreement contemplated a sharing of arbitration forum costs, the Supreme Court of California refused to enforce the agreement as written. Instead the state court created a blanket rule that all employers must always pay all arbitration forum costs in matters involving state law claims of wrongful termination in violation of public policy.[1] This holding is preempted by the FAA. Congress enacted the FAA "to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined . . . by state courts . . . ." *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984). Recognizing "the widespread unwillingness of state courts to enforce arbitration agreements," Congress intended the FAA "to be a broad enactment appropriate in scope to

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[1] The Supreme Court of California had previously created a blanket rule that all employers must always pay all arbitration forum costs in matters involving claims brought under the California Fair Employment and Housing Act, Cal. Gov. Code, § 12900 *et seq*. *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000). This case represents an extension of the *Armendariz* rule to state common law claims.

meet the large problems Congress was addressing" - - i.e., judicial hostility to arbitration - - "unencumbered by state-law constraints." *Id.* at 13-14. The FAA therefore preempts all state laws and rulings disfavoring arbitration, such as the "employer always pays" rule at issue here. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

The Court recently affirmed that the FAA applies to "all contracts of employment" except those of "transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001). "We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. [Citation omitted.] Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation. . . ." *Id.* at 123.

The Supreme Court of California holding is in irreconcilable conflict with the FAA and decisions of the Court interpreting the enforceability of agreements to arbitrate subject to the FAA. An arbitration agreement, like the one here, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). The mere sharing of arbitration forum costs, absent proof of such prohibitive expense that a party's substantive rights cannot be vindicated, is not grounds for refusing to enforce an otherwise valid arbitration agreement subject to the FAA. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). Further, the "employer always pays" rule created by the Supreme Court of California is applicable only to a narrow category of employment arbitration agreements, and not to contracts generally. As

such, this judicially-created state rule violates the FAA. *Doctors Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.").

The Supreme Court of California created the "employer always pays" rule over the dissent of three of the seven Judges who heard the case. Judge Brown's opinion, in which Judges Baxter and Chin concurred, viewed the majority decision as "turning the judicial clock backwards to an era of hostility toward arbitration" and as "chipping away at" the Court's "precedents broadly construing the scope of the FAA . . . ." App. 46a. Judge Brown's opinion concludes by urging "the high court to clarify once and for all whether our approach to arbitration law comports with its precedents." *Id.*

II. Factual background.

Respondent Alexander M. Little worked for Petitioner Auto Stiegler, Inc., an automobile dealership. App. 3a. Before commencing his employment, and twice during his employment, Little voluntarily signed contractual agreements to resolve, through private binding arbitration, any controversy arising out of or relating to his employment. App. 3a, 48a. All three arbitration agreements are similar in both form and substance; the last agreement is dated January 13, 1997, and is reprinted in Appendix E of this Petition.

The arbitration agreement provides that "any claim, dispute or controversy . . . arising from, related to, or having any relationship or connection whatsoever with . . . employment by, or other association with, the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, shall be submitted to and determined exclusively by binding arbitration . . . ." App. 85 - 86a. The agreement itself is silent as to arbitration forum costs, but it expressly states that arbitrations are to take place "under the Federal

Arbitration Act, in conformity with the procedures of the California Arbitration Act . . . ." *Id.* Section 1284.2 of the California Arbitration Act contemplates that the parties will share arbitration forum costs.

Auto Stiegler terminated Little's employment, and Little filed an action in state court alleging: (i) tortious demotion and termination in violation of public policy, (ii) breach of an implied contract of continued employment, and (iii) breach of an implied contract of good faith and fair dealing. App. 50a. Little did not sue under the California Fair Employment and Housing Act or any other statute. Auto Stiegler's response to the state court action was a Motion to Compel Arbitration and to Stay the Proceedings. App. 50a, 72a. By its response, Auto Stiegler sought to enforce the contractual agreement between the parties to arbitrate employment related disputes.

III. Proceedings below.

On August 7, 2000, the Superior Court of California granted Auto Stiegler's motion to compel arbitration and stated: "I think this really is a forum-shifting kind of arbitration agreement. It seems to be relatively - - actually very fair." App. 83a.

Two weeks later on August 24, 2000, the Supreme Court of California issued its decision in *Armendariz*.[2] The *Armendariz* court held that an agreement to arbitrate discrimination claims under the California Fair Employment and Housing Act ("FEHA"), Cal. Gov. Code § 12900 *et seq.*, is valid only if certain requirements are met. Specifically, the *Armendariz* holding requires the following requirements be met before a contract requiring arbitration of FEHA claims

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[2] *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000).

will be enforced: (1) the arbitration agreement may not limit the damages normally available under the statute, (2) there must be discovery sufficient to arbitrate the statutory claim adequately, (3) there must be a written arbitration decision and judicial review sufficient to ensure that the arbitration complies with the requirements of the statute, and (4) the employer must "pay all types of costs that are unique to arbitration." App. 15a.[3]

On September 22, 2000, Little filed a motion with the superior court to reconsider its order compelling arbitration in light of the *Armendariz* decision. On October 31, 2000, the superior court reversed its earlier decision and denied Auto Stiegler's motion to compel arbitration, holding that the arbitration agreement did not comport with the requirements for arbitrating state statutory claims set forth in *Armendariz*. App. 64a - 66a. Auto Stiegler appealed.

The Court of Appeal of the State of California, Second Appellate District, Division Five, reversed the superior court and ordered that the claims be arbitrated. App. 62a. The appeals court held that the *Armendariz* requirements were inapplicable to the state common law claims raised in this case and, consistent with the FAA, held that the arbitration agreement must be enforced according to its terms. App. 52 - 54a, 62a. The appeals court specifically rejected Little's argument that the sharing of arbitration forum costs rendered the agreement unconscionable under state contract law. App.

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[3] The *Armendariz* court relied extensively on *Cole v. Burns Intern. Sec. Svcs.*, 105 F.2d 1465 (D.C. Cir. 1997), which set forth similar requirements for arbitrating *federal* statutory claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* App. 16a.

57a - 59a. The appeals court reviewed the record on the arbitration forum costs issue and stated that Little:

> . . . presented no evidence to support [his] contention concerning the costs of arbitration. He presented no evidence of the costs of arbitration nor his alleged inability to pay such expenses. He presented no evidence to show that he would pay more to arbitrate than to undergo the costs of litigating in a courtroom.

App. 57a.

Applying the Court's decision in *Green Tree* to this record, the appeals court held that:

> . . . there is no merit to the argument that the statutory requirement that plaintiff pay his share of arbitration costs in connection with his non-statutory claims . . . renders the agreement to arbitrate unconscionable in this case which is subject to the United States Arbitration Act.

App. 58a.

In a 4-3 decision, the Supreme Court of California reversed the appeals court and held that the *Armendariz* requirements created for statutory claims also apply to state common law claims alleging wrongful termination in violation of public policy. App. 14a - 23a. Central to this Petition, the Supreme Court of California refused to enforce the parties' arbitration agreement as written regarding the sharing of arbitration forum costs. Instead, the Court held that Auto Stiegler must pay all arbitration forum costs. App. 24a -

29a.[4] The three dissenting Judges concluded that the *Armendariz* "employer always pays" rule could not be applied in this case. Judge Brown's opinion reasoned that the Supreme Court of California is precluded by FAA preemption from doing so, and that the majority's holding "usurps Congress's authority to establish 'the supreme law of the land.'" App. 45a - 46a, *citing* U.S. Const., art. VI, cl.2.

Auto Stiegler raised and preserved the FAA preemption argument in the California courts at every level. In its briefs to the lower courts and the Supreme Court of California, Auto Stiegler argued that a refusal to enforce the agreement as written could violate the FAA and ignore its preemptive effect. Portions of the briefs in the California courts raising the FAA issue are reprinted in Appendix F.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court when deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Here, a majority of the Supreme Court of California has created an "employer always pays" rule applicable to arbitration agreements that is preempted by the FAA and that is in irreconcilable conflict with decisions of this Court interpreting the FAA. The conflict created by the majority

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[4] The Supreme Court of California did not hold that the arbitration agreement failed to meet any of the *Armendariz* requirements other than the "employer always pays" requirement. App. 23a. The court did sever an arbitration appeal provision contained in the agreement on the ground that it was unconscionable under state contract law. App. 11a - 14a. This latter ruling is not at issue in this Petition.

decision must be resolved in favor of the federal law pursuant to the Supremacy Clause of the United States Constitution. The dissenting Judges acknowledge that the Supreme Court of California is overstepping its authority, and they also urge the Court to intercede and resolve this important question of federal law involving the preemptive scope of the FAA.

I. The FAA preempts state statutes and judicially created rules that interfere with the enforcement of arbitration agreements subject to it.

The FAA evinces a supreme and preemptive federal policy favoring the enforcement of arbitration agreements involving interstate commerce. In enacting the FAA, Congress sought "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). The primary substantive provision of the FAA states that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).[5]

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[5] There is no doubt that the arbitration agreement entered into between Auto Stiegler and Little in this matter is covered by the FAA. The business conducted by Auto Stiegler, operation of an automobile dealership, affects interstate commerce. *See* e.g.,

The Court has demonstrated the far reaching preemptive scope of the FAA by repeatedly invalidating, under the Supremacy Clause, state laws that attempt to limit the enforceability of arbitration agreements. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (FAA preempts Montana law requiring special notice requirement on arbitration agreements.); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995) (FAA preempts New York prohibition against arbitrating punitive damages.); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268-277 (1995) (FAA preempts Alabama statute making predispute arbitration agreements unenforceable.); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (FAA preempts California statute prohibiting arbitration of wage collection actions.); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (FAA preempts California statute prohibiting arbitration of claims under the California Franchise Investment Law.).

In invalidating these state limits on arbitration, the Court has explained that Section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary.*" *Perry*, 482 U.S. at 489

Cartage, Inc. v. Ford Dealers Adver. Ass'n, 446 F.2d 289, 292 (9th Cir. 1971) (Sale of cars to customers is "an essential part of the flow of interstate commerce. To say the least, these resales directly affect interstate commerce.") The Court recently held that the FAA Section 1 exclusion of contracts of employment applies only to seaman, railroad and other transportation workers. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). The Section 1 exclusion is inapplicable here. Further, the Supreme Court of California acknowledged that the arbitration agreement between Auto Stiegler and Little was subject to the FAA, but erroneously concluded that the "employer always pays" rule did not conflict with the FAA. App. 20a - 21a.

(emphasis added). Congress "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration" in order "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 10, 16. Thus, "the FAA ensures" that an arbitration agreement "will be enforced according to its terms *even if a rule of state law would otherwise exclude such claims from arbitration.*" *Mastrobuono,* 514 U.S. at 58 (emphasis added). "[A]ny state policy" that purports to invalidate an arbitration clause in a contract that is otherwise enforceable under state law is "unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the [FAA] language and Congress' intent [citation omitted]." *Allied-Bruce*, 513 U.S. at 281.

Opposing the conclusion reached by the Court in *Circuit City* that the FAA applies to "all contracts of employment" except those of "transportation workers," various *amici* "including the attorney generals of 22 States," argued that this broad construction of the FAA "intrudes upon the policies of the separate States" by "effect[ively] pre-empt[ing] . . . state employment laws which restrict or limit the ability of employees and employers to enter into arbitration agreements." *Circuit City*, 532 U.S. at 109, 121-22. The Court responded that, under *Gilmer*,[6] arbitration agreements in employment contracts "can be enforced under the FAA without contravening the policies of *congressional enactments* giving employees specific protection against discrimination prohibited by federal law." *Id.* at 123 (emphasis added). As for the policies of the *state* laws, the Court found them irrelevant under *Southland's* holding "that Congress intended

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[6] *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991).

the FAA . . . to pre-empt state anti-arbitration laws to the contrary." *Id.* at 122.

For all of these reasons, the state-created "employer always pays" rule is preempted by the FAA. The rule applied by the Supreme Court of California therefore violates the Supremacy Clause and this Petition should be granted.

II. The "employer always pays" rule is also in irreconcilable conflict with the Court's decision in *Green Tree*.

The "employer always pays" rule also conflicts with the Court's decision in *Green Tree*. The arbitration agreement in *Green Tree* was silent with respect to the payment of arbitration forum costs. *Green Tree*, 531 U.S. at 84. Randolph, who financed the purchased of a mobile home through Green Tree, argued that the "risk" posed to her ability to vindicate federal statutory rights by "prohibitive" arbitration costs rendered the arbitration agreement unenforceable. *Id.* at 90. The Court rejected that argument.

The *Green Tree* record did not show the existence of such prohibitive arbitration forum costs so as to preclude Randolph from vindicating her federal statutory rights, "[i]ndeed, it contains hardly any information on the matter." *Id.* The Court reasoned that to invalidate the arbitration agreement based on a potential risk of prohibitive costs would undermine the "'liberal federal policy favoring arbitration agreements'" and would "conflict with our prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Id.* at 91, *quoting Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Here, Little made no showing that the sharing of arbitration forum costs would be so "prohibitive" as to

prevent him from vindicating his state common law rights. In fact, the record contains no evidence regarding arbitration costs. App. 57a - 58a. The blanket rule adopted by the Supreme Court of California requiring all employers to always pay all arbitration forum costs is in irreconcilable conflict with *Green Tree* and undermines "the liberal federal policy favoring arbitration agreements."[7]

While acknowledging that its approach to arbitration forum costs is "in some respects different" from the *Green Tree* approach, the Supreme Court of California attempts to avoid FAA preemption by claiming that the "employer always pays" rule does not "improperly disfavor arbitration in comparison to other contract clauses." App. 28a. This attempt fails. The FAA requires enforcement of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of *any contract*." 9 U.S.C. § 2 (emphasis added).

The judicially-created "employer always pays" rule operates to deny enforcement of the arbitration agreement as written based on grounds that are unique to employment

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[7] Following *Green Tree*, all federal appeals courts except the Ninth Circuit to consider the issue have adopted the *Green Tree* case-by-case approach. *See Musnick v. King Motor Co. of Ft. Lauderdale*, 2003 U.S. App. LEXIS 6014, ** 5-9 (11th Cir. 2003) (collecting cases). These decisions involve federal statutory rights, rather than state law public policy claims, and they interpret *Green Tree* to require a party seeking to avoid arbitration to establish that enforcement of arbitration forum cost sharing provisions would "preclude" the vindication of federal rights in the arbitral forum. *Id.* at * 9. A state court cannot, consistent with FAA preemption, require a lesser showing through use of a blanket "employer always pays" rule in matters involving non-statutory state law claims.

arbitration agreements. The Supreme Court of California expressly acknowledges that this

> rule would *only apply to mandatory, predispute employment arbitration agreements*, and because in many instances arbitration will be considered an efficient means of resolving a dispute both for the employer and the employee, the employer seeking to avoid both payment of all forum costs and litigation can attempt to negotiate post-dispute arbitration agreements with its aggrieved employees.

Armendariz, 24 Cal. 4th at 112, 6 P.3d at 688, 99 Cal. Rept. 2d at 765-66 (emphasis added).

By its own terms, this state rule applies uniquely to arbitration agreements in the employment context. By creating a rule applicable only to employment arbitration agreements, the Supreme Court of California violates the FAA.

> Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of [the FAA]. . . .Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Perry, 482 U.S. at 492 n.9. *See also*, *Doctors Assocs., Inc.*, 517 U.S. at 687 ("Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."); *Mastrobuono*, 514 U.S. at 58 (The FAA preempts a judicially-created rule prohibiting arbitrators from awarding punitive damages.); *Allied-Bruce*, 513 U.S. at 281 (FAA preempts state rule that places arbitration agreements on "unequal 'footing,' directly contrary to the [FAA] language and Congress' intent.").[8]

The Petition should also be granted because the state court's blanket rule conflicts with the Court's decision in *Green Tree*.

III. The creation of the "employer always pays" rule in matters involving the arbitration of state law public policy claims is based on a flawed analysis of FAA preemption and the federal appeals court case from which it was adopted.

Congress enacted the FAA. Congress is free to narrow the scope of its enactments. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Consistent with this principle, the Court had recognized that the FAA does not govern if "'*Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), *quoting Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985) (emphasis added). Such

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[8] The state court singles out only the narrow category of employment arbitration agreements for application of the blanket "employer always pays" rule. That rule also conflicts with California statutory law. Section 1284.2 of the California Arbitration Act applies to all arbitration agreements and it contemplates cost sharing.

an intention by Congress may, however, be discerned only from "the text [of a federal statute], its legislative history, or an 'inherent conflict' between arbitration and [that statute's] underlying purposes." *Id.* at 26, *quoting McMahon*, 482 U.S. at 227. Thus, in the absence of a *federal* statute evidencing a clear intent by Congress to restrict arbitration, the FAA controls and precludes courts from imposing their own arbitration-specific restrictions. FAA preemption precludes the enforcement of state statutes or judicially-created rules that interfere with the enforcement of otherwise valid arbitration agreements subject to the FAA. *See* Section I above.

The Supreme Court of California relied extensively on *Cole v. Burns Int'l. Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997), when it adopted the "employer always pays" rule for arbitration of state statutory discrimination claims in *Armendariz*. The District of Columbia Circuit Court of Appeals in *Cole* started its analysis by reviewing the Court's decision in *Gilmer*, which enforced an agreement to arbitrate federal statutory employment claims. Under *Gilmer*, the arbitration agreement is valid "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." *Gilmer*, 500 U.S. at 28. Relying on the fact that the Court in *Gilmer* "endorsed a system of arbitration in which employees are not required to pay for the arbitrator assigned to hear their statutory claims,"[9] the *Cole* court concluded that there "is no reason to think the Court would have approved arbitration in the absence of this arrangement." *Cole*, 105 F.3d at 1484. The *Cole* court therefore held that it would not enforce an agreement

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[9] Under the NYSE and NASD arbitration rules at issue in *Gilmer*, it was standard practice for employers to pay all of the arbitrator's fees. *Cole*, 105 F.3d at 1483.

requiring arbitration of federal statutory rights if the agreement required the employee "to pay all or part of the arbitrator's fees and expenses." *Id.* at 1485.

The Supreme Court of California in *Armendariz*, relying on the *Cole* rationale regarding arbitration of *federal* statutory employment claims, adopted the "employer always pays" rule for arbitration of *state* statutory employment claims.[10] In this case, the Supreme Court of California extended the *Cole/Armendariz* rule to state common law claims for wrongful termination in violation of public policy. This extension shows a complete disregard of the federal preemption doctrine and the Supremacy Clause.

In *Brown v. Wheat First Securities, Inc.*, 257 F.3d 821 (D.C. Cir. 2001), the D.C. Circuit itself refused to extend *Cole* to a common law claim for wrongful termination in violation of public policy. In *Brown*, the employee raised a "whistleblower" public policy claim similar to the one Little raises here. In refusing to extend *Cole* to common law public policy claims, the court reasoned:

> We also see no basis for extending *Cole*. As we have explained, our central rationale - - respecting congressional intent - - does not extend beyond the statutory context. Moreover, by enacting the Federal Arbitration Act, Congress "manifest[ed] a liberal federal policy favoring arbitration agreements.". . . The [FAA] also pre-empted state restrictions on the enforcement of arbitration agreements.

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[10] For the reasons stated in Sections I and II above, Auto Stiegler contends that the *Armendariz* "employer always pays" rule is preempted by the FAA even when applied to arbitration of state statutory claims, but that issue is not raised by this Petition.

> [citations omitted] *Gilmer*, as we've seen, framed the question as whether dispute resolution under the FAA was consistent with the federal right-creating statute in question . . . . For a common law claim under the District of Columbia law, any such inconsistency would be resolved in favor of the only federal law involved, the FAA.
>
> * * *
>
> [The employee] nowhere asserts that D.C. law creates a *Cole* like requirement for its own common law "public policy" causes of action. Perhaps this omission is because state restrictions on arbitration are pre-empted by the Federal Arbitration Act.

Brown, 257 F.3d at 825-26.

This reasoning is equally applicable here. Even the court in which the "employer always pays" rule originates does not apply it to common law claims of wrongful termination in violation of public policy. FAA preemption of such a rule is recognized by that court.

Moreover, the *Armendariz* decision quotes with approval the *Cole* court's assumption that the Court would not have approved arbitration in *Gilmer* absent the NYSE and NASD arbitration forum arrangement that the employer pays the arbitration fees. *Armendariz*, 24 Cal. 4th at 107-08, 6 P.3d at 685, 99 Cal. Rptr. 2d at 762-63. The Court's decision in *Green Tree* negates any assumption that the Court would not approve arbitration of employment claims in the absence of an employer pay arrangement. Thus, a primary reason for the *Cole* court's adoption of the "employer always pays" rule has been nullified by a later decision of the Court.

As shown above, the "employer always pays" rule adopted by the state court in this case is in direct conflict with *Green Tree*. Following *Green Tree*, the D.C. Circuit[11] and all other federal courts of appeals except the Ninth Circuit to consider the issue have rejected a blanket "employer always pays" rule for arbitration of federal statutory claims. Instead, federal courts of appeal apply the *Green Tree* case-by-case approach to determine if arbitration costs are so prohibitive as to prevent vindication of statutory rights.[12] As the D.C. Circuit recognized in *Brown*, extension of the "employer always pays" rule to state law public policy claims is preempted by the FAA, the only federal law involved.

IV. The Court should prevent the "employer always pays" rule from expanding to every predispute employment arbitration agreement in California.

Notwithstanding the Court's decision in *Green Tree* requiring the party seeking to avoid arbitration to demonstrate that arbitration costs are so "prohibitive" as to prevent vindication of statutory rights, parties seeking to avoid arbitration in California courts need make no such showing. Rather, the Supreme Court of California requires all employers to pay all arbitration forum costs in arbitrations of statutory discrimination claims (*Armendariz*), and the court has now extended that rule to state common law claims based on public policy. The public policy rationale for the state court's holding in this case can be extended to virtually any employment claim. The public policy rationale used by the state court to create and expand the "employer always pays"

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[11] *See Laprade v. Kidder, Peabody & Co., Inc.*, 246 F.2d 702, 706-08 (D.C. Cir. 2001).

[12] See footnote 7, *supra*.

rule, as noted by the dissenting Judges, "subjects most, if not all, tort claims to the *Cole/Armendariz* requirements." App. 45a. "All claims not based on contract - including, for example, . . . defamation and tortious interference claims . . . implement values that society has one way or another thought deserving." *Brown*, 257 F.3d at 826. Under the public policy rationale for the rule, "it is hard to see what falls outside it." *Id.*

No doubt the Supreme Court of California considers common law claims alleging violation of public policy important. However, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our [federal] Constitution provided [in the Supremacy Clause] that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962).

The Court has in the past struck down California statutory provisions preempted by the FAA. *See Perry* and *Southland*. The Court is asked here to strike down a California state court-created obstacle to arbitration that is likewise preempted, and to reaffirm that state courts "should not chip away at *Southland* by indirection" and create rules that ignore the broad preemptive scope of the FAA. *Circuit City*, 532 U.S. at 122.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted. As an alternative to this Petition, Auto Stiegler respectfully requests summary reversal of the Supreme Court of California's decision in this case and an order to enforce the arbitration agreement as written with respect to payment of arbitration forum costs.

Respectfully submitted.

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APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

No. S101435

[Filed February 27, 2003]

ALEXANDER M. LITTLE, Plaintiff and Respondent,	)
v.	)
AUTO STIEGLER , INC., Defendant and Appellant.	)

Appeal from Second District, Fifth Division,
Los Angeles County
B147003, 92 Cal. App. 4th 329, 112 Cal Rptr. 2d 56
Super. Ct. No. BC230809
S. Patricia Spear

JUDGES:

MORENO, J. WE CONCUR: GEORGE, C. J., KENNARD, J., WERDEGAR, J. CONCURRING AND DISSENTING OPINION BY BAXTER, J. CHIN, J., CONCUR WITH BAXTER'S DISSENT. BROWN, J. CONCURRING AND DISSENTING OPINION BY BROWN, J. CONCUR WITH BROWN'S DISSENT: BAXTER, J., CHIN, J.

OPINION

In this case, we consider four interlocking questions: (1) Is a provision in a mandatory employment arbitration agreement that permits either party to "appeal" an arbitration award of more than $50,000 to a second arbitrator, unconscionable; (2) if it is unconscionable, then should that unconscionable provision be severed from the rest of the arbitration agreement and the agreement enforced, or is the entire agreement invalid; (3) if the former, then in reviewing the rest of the arbitration agreement, do the minimum requirements for arbitration of unwaivable statutory claims that we set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (*Armendariz*) apply also to claims that an employee was terminated in violation of public policy; (4) if yes, then must one of those requirements that the employer imposing mandatory arbitration on the employee must pay all costs unique to arbitration be reconsidered and revised in light of a post- *Armendariz* United States Supreme Court decision on arbitration costsharing, Green Tree Financial *Corp. v. Randolph Ed.* 2d 373, 121 (2000) 531 U.S. 79, 148 L. S. Ct. *513* (*Green Tree*).

We conclude as follows: (1) the appellate arbitration provision for arbitration awards over $50,000 is unconscionable; (2) that provision should be severed and the rest of the arbitration agreement enforced; (3) a suit claiming wrongful termination in violation of public policy should be subject to the requirements set forth in *Armendariz*; and (4) *Green Tree* does not require that we modify *Armendariz*'s cost requirements. We accordingly partly reverse the Court of Appeal's judgment.

I. STATEMENT OF FACTS

Alexander Little worked for Auto Stiegler, Inc., an automobile dealership. Little eventually rose to become Auto Stiegler's service manager. He alleges that he was demoted, then terminated, for investigating and reporting warranty fraud. He filed an action against defendant for tortious demotion in violation of public policy; tortious termination in violation of public policy; breach of an implied contract of continued employment; and breach of the implied covenant of good faith and fair dealing. In the first through third causes of action, he sought compensatory and punitive damages. In the fourth cause of action, plaintiff sought only contract breach damages. He sought no relief under the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12900 et seq.)

Little signed three nearly identical arbitration agreements while employed by defendant in June 1995, October 1996, and January 1997. The most recent of the three stated as follows: "I agree that any claim, dispute, or controversy (including, but not limited to, any and all claims of discrimination and harassment) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, and officers, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with, the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. Sec 1280 et seq., including section 1283.05

and all of the act's other mandatory and permissive rights to discovery); provided, however, that: In addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure section 631.8. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis other than such controlling law, including but not limited to, notions of 'just cause.' As reasonably required to allow full use and benefit of this agreement's modifications to the act's procedures, the arbitration shall extend the times set by the act for the giving of notices and setting of hearings. Awards exceeding $50,000.00 shall include the arbitrator's written reasoned opinion and, at either party's written request within 20 days after issuance of the award, shall be subject to reversal and remand, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial. I understand by agreeing to this binding arbitration provision, both I and the Company give up our rights to trial by jury."

Auto Stiegler's initial motion to compel arbitration was granted. Following our decision in *Armendariz*, the trial

court, upon plaintiff's request for reconsideration, denied defendant's motion to compel arbitration. The trial court ruled: "The court believes that the arbitration clause in issue does not meet the standards set forth by the Supreme Court and it should not be enforced. The clauses of the arbitration agreement that do not comport with the requirements of the Armendariz [decision] include the clauses that:¶ 1. Require the Plaintiff to share the costs; ¶ 2. Provide for no judicial review. The court deems this fatal, as judicial review of all decisions is not the same as limited review by another arbitrator of only certain awards; ¶ 3. Limit the remedies available to the complaintant [*sic*] [to] possibly exclude equitable as opposed to legal remedies, to which he might otherwise be entitled. ¶ 4. Lack of mutuality of remedy, in that this clause, unlike the one in *Armendariz* does not obviously bind the employer to likewise enforce its right in the arbitration forum."

The Court of Appeal reversed. It held that the *Armendariz* requirements did not apply to nonstatutory claims. Further, it rejected the claim that the arbitration agreement was unconscionable. It focused on *Armendariz*'s discussion of whether both parties were bound to arbitrate, and concluded that the arbitration agreements did in fact bind both parties. The Court of Appeal did not consider whether the arbitration "appeal" triggered by an award of greater than $50,000 was unconscionable. Finally, the court concluded that under the United States Supreme Court's decision in *Green Tree*, silence as to who would bear the costs of arbitration was not a basis for invalidating the agreement. We granted review.

II. DISCUSSION

A. Unconscionability of Appellate Arbitration Provision

As recounted, the arbitration agreement provided that "[a]wards exceeding $50,000.00 shall include the arbitrator's written reasoned opinion and, at either party's written request within 20 days after issuance of the award, shall be subject to reversal and remand, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial." Little contends this provision is unconscionable. We agree.

To briefly recapitulate the principles of unconscionability, the doctrine has " 'both a "procedural" and a "substantive" element,' the former focusing on '"oppression" ' or ' "surprise" ' due to unequal bargaining power, the latter on '"overly harsh"' or ' "one-sided"' results." (*Armendariz*, *supra*, 24 Cal.4th at p. 114.) The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, " 'which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" (*Id.* at p. 113.) "In the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Id.* at p. 115.) It is clear in the present case that Auto Stiegler imposed on Little an adhesive arbitration

agreement.

Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided. One such form, as in *Armendariz*, is the arbitration agreement's lack of a " 'modicum of bilaterality,' " wherein the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration. (Armendariz, *supra*, 24 Cal.4th at p. 119.) Another kind of substantively unconscionable provision occurs when the party imposing arbitration mandates a post-arbitration proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed. Two Court of Appeal cases have addressed this kind of unconscionability.

In *Beynon v. Garden Grove Medical Group* (1980) 100 Cal. App. 3d 698 (*Benyon*), the medical group imposed on its patients a mandatory arbitration agreement. Paragraph B of the agreement authorized the medical group, but not the patient, to reject the first arbitration award and submit the dispute to a second arbitration panel. The court held the provision unconscionable. "That the provisions of paragraph B unreasonably limit the obligations of the health plan and health care provider and defeat the reasonable expectations of one enrolling in the plan is manifest. The term arbitration normally imports a dispute resolution procedure which is speedy, economical and 'bears equally' on the parties. [Citation.] The provisions of paragraph B, however, are weighted in favor of the health plan and provider of services and against members and can render arbitration an expensive and protracted proceeding. By granting to only the health plan or health care provider the unilateral right to reject an arbitration award without cause and to require rearbitration,

paragraph B enables the health plan and health care provider to transform arbitration into virtually a 'heads I win, tails you lose' proposition." (*Benyon*, *supra*, 100 Cal. App. 3d at p. 706.)

Saika v. Gold (1996) 49 Cal.App.4th 1074, (*Saika*), also arose in the doctor/patient setting. The arbitration agreement in that case had a provision that permitted either party to reject an arbitration award of $25,000 or greater and request a trial de novo in superior court. The Court of Appeal refused to enforce the provision and instead directed the trial court to confirm the $325,000 award in the patient's favor. The court rejected the doctor's argument that the case was distinguishable from *Benyon* because the challenged arbitration provision permitted *either* party to request a trial de novo if the award exceeded the stated amount. "[I]n the vernacular of late 20th century America, let us 'get real.' As a practical matter, the benefit which the trial de novo clause confers on patients is nothing more than a chimera. The odds that an award will *both* (a) clear the $25,000 threshold but (b) *still* be so low that the *patient* would *want* to have a trial de novo are so small as to be negligible. Unless we are to assume that arbitrators in medical malpractice cases regularly and capriciously make awards substantially below what justice requires and that is an assumption which we will not indulge the cases where the trial de novo clause could possibly benefit the patient are going to be rare indeed." (*Saika*, *supra*, 49 Cal.App.4th at p. 1080.) The court concluded that "the rejection clause meant the arbitration agreement really did not function as an *arbitration* agreement. The promise of an inexpensive, speedy resolution to the claim evaporated with one party's unilateral ability to avoid results it did not like. [¶] We have already referred to the strong public policy

favoring arbitration. That policy is manifestly undermined by provisions in arbitration clauses which seek to make the arbitration process itself an offensive weapon in one party's arsenal." (*Id.* at p. 1081.)

Auto Stiegler and its amici curiae make several arguments to distinguish this case from *Benyon* and *Saika*. First, they claim that the arbitration appeal provision applied evenhandedly to both parties and that, unlike the doctor/patient relationship in *Saika*, there is at least the possibility that an employer may be the plaintiff, for example in cases of misappropriation of trade secrets. (See, e.g., *Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310) But if that is the case, they fail to explain adequately the reasons for the $50,000 award threshold. From a plaintiff's perspective, the decision to resort to arbitral appeal would be made not according to the amount of the arbitration award but the potential value of the arbitration claim compared to the costs of the appeal. If the plaintiff and his or her attorney estimate that the potential value of the claim is substantial, and the arbitrator rules that the plaintiff takes nothing because of its erroneous understanding of a point of law, then it is rational for the plaintiff to appeal. Thus, the $50,000 threshold inordinately benefits defendants. Given the fact that Auto Stiegler was the party imposing the arbitration agreement and the $50,000 threshold, it is reasonable to conclude it imposed the threshold with the knowledge or belief that it would generally be the defendant.

Although parties may justify an asymmetrical arbitration agreement when there is a "legitimate commercial need" (*Armendariz, supra*, 24 Cal.4th at p. 117), that need must be "other than the employer's desire to maximize its advantage" in the arbitration process. (*Id.* at p. 120.) There is no such

justification for the $50,000 threshold. The explanation for the threshold offered by amicus curiae Maxie, Rheinheimer, Stephens & Vrevich that an award in which there is less than that amount in controversy would not be worth going through the extra step of appellate arbitral review makes sense only from a defendant's standpoint and cannot withstand scrutiny.

Auto Stiegler also argues that an arbitration appeal is less objectionable than a second arbitration, as in *Benyon*, or a trial de novo, as in *Saika*, because it is not permitting a wholly new proceeding, making the first arbitration illusory, but only permitting limited appellate review of the arbitral award. We fail to perceive a significant difference. Each of these provisions is geared toward giving the arbitral defendant a substantial opportunity to overturn a sizable arbitration award. Indeed, in some respects appellate review is more favorable to the employer attempting to protect its interests. It is unlikely that an arbitrator who merely acts in an appellate capacity will increase an award against the employer, whereas a trial or arbitration de novo at least runs the risk that the employer would become liable for an even larger sum than that awarded in the initial arbitration.

We therefore conclude that the arbitral appeal provision in this particular agreement is unconscionably one-sided and may not be enforced. We next turn to the question whether this provision may be severed and the rest of the arbitration agreement enforced, or whether the entire agreement should be invalidated.

B. Is the Unconscionable Portion of the Agreement Severable?

In *Armendariz*, we reviewed the principles regarding the severance of illegal terms from an arbitration agreement. As we stated: "Two reasons for severing or restricting illegal terms rather than voiding the entire contract appear implicit in case law. The first is to prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement particularly when there has been full or partial performance of the contract. [Citations.] Second, more generally, the doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme. [Citations.] The overarching inquiry is whether ' "the interests of justice . . . would be furthered" ' by severance. [Citation.] Moreover, courts must have the *capacity* to cure the unlawful contract through severance or restriction of the offending clause, which . . . is not invariably the case." (*Armendariz*, *supra*, 24 Cal.4th at pp. 123-124.) Accordingly, "[c]ourts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Id.* at p. 124.)

In *Armendariz*, we found two factors weighed against severance of the unlawful provisions. "First, the arbitration agreement contains more than one unlawful provision; it has both an unlawful damages provision and an unconscionably unilateral arbitration clause. Such multiple defects indicate a

systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage. . . . [¶] Second, in the case of the agreement's lack of mutuality, . . . permeation [by an unlawful purpose] is indicated by the fact that there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement. Rather, the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms. Civil Code section 1670.5 does not authorize such reformation by augmentation, nor does the arbitration statute. Code of Civil Procedure section 1281.2 authorizes the court to refuse arbitration if grounds for revocation exist, not to reform the agreement to make it lawful. Nor do courts have any such power under their inherent limited authority to reform contracts. [Citations.]" (*Armendariz*, *supra*, 24 Cal.4th at pp. 124-125.)

Neither of these factors are operative in the present case. There is only a single provision that is unconscionable, the one-sided arbitration appeal.[1] And no contract reformation is

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[1] We note that the other three grounds the trial court found in this case for refusing to enforce the arbitration agreement, described in the statement of facts above, do not appear to be valid. First, the fact that an arbitration agreement does not explicitly provide for judicial review is no basis for invalidating it. (*Armendariz*, *supra*, 24 Cal.4th at p. 107.) Second, unlike in *Armendariz*, nothing in the language of the present agreement limits remedies and no limitation should be implied. Finally, unlike the agreement in *Armendariz*, which explicitly limited the scope of the arbitration agreement to wrongful termination claims and therefore implicitly excluded the employer's claims against the employee (*id.* 24 Cal. 4th at pp. 92, 24 Cal. 4th 120), the arbitration agreement

required — the offending provision can be severed and the rest of the arbitration agreement left intact. Thus, the courts in *Benyon* and *Saika*, considering similar provisions, severed them and enforced the rest of the arbitration agreement (*Benyon, supra,* 100 Cal.3d at p. 713; *Saika, supra,* 49 Cal.4th at p. 1082.)

Moreover, there is no indication that the state of the law was "sufficiently clear at the time the arbitration agreement was signed to lead to the conclusion that this [appellate

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in the present case contained no such limitation, instead applying to "any claim, dispute, or controversy . . . between [the employee] and the Company."

Amicus curiae California Employment Lawyers Association points to other provisions in the agreement that are, in its view, contrary to public policy or unconscionable. Essentially, amicus curiae objects to the incorporation of legal formalities into Auto Stiegler's arbitration agreement: its mandate that the rules of pleading and evidence shall be observed, that the arbitrator shall only rely on governing law and not informal principles of "just cause," and that traditional judicial motions such as demur and summary judgment be available to the parties. They claim that such procedures detract from the inherent informality of arbitration. Without more, however, we cannot say that these provisions, which make arbitration more closely follow judicial procedures, are unconscionably one- sided. It is not at all obvious that such provisions would inordinately benefit Auto Stiegler rather than Little. To the extent that the availability of dispositive pre-arbitration motions favor Auto Stiegler as defendant, they confer no more of an advantage than would be the case had the action been brought in court.

arbitration provision] was drafted in bad faith." (*Armendariz, supra*, 24 Cal.4th at pp. 124-125, fn. 13.) There is enough of a difference between the appellate arbitration provision, drafted in the employment context, and the de novo trial and arbitration provisions in the doctor/patient setting in *Benyon* and *Saika*, to preclude a determination that the provision was directly contrary to settled law and therefore inferentially drafted in bad faith.

We therefore conclude that Auto Stiegler's arbitration agreement is valid and enforceable once the unconscionable appellate arbitration provision is deleted. Whether a court should refuse to enforce it on other grounds will be considered below.

C. Is Arbitration of a Tameny Claim Subject to the Minimal Procedural Requirements Set Forth in Armendariz?

In *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178, we recognized that although employers have the power to terminate employees at will, they may not terminate an employee for a reason that is contrary to public policy. Little claims that arbitration of *Tameny* claims are subject to the minimum requirements set forth in *Armendariz*, reviewed below. We agree.

In *Armendariz*, we held that arbitration of claims under the FEHA is subject to certain minimal requirements: (1) the arbitration agreement may not limit the damages normally available under the statute (*Armendariz, supra*, 24 Cal.4th at p. 103); (2) there must be discovery "sufficient to adequately arbitrate their statutory claim" (*id.* at p. 106*);* (3) there must be a written arbitration decision and judicial review "

'sufficient to ensure the arbitrators comply with the requirements of the statute'" (*ibid.*); and (4) the employer must "pay all types of costs that are unique to arbitration" (*id.* at p. 113*)*.

These requirements were founded on the premise that certain statutory rights are unwaivable. "This unwaivability derives from two statutes that are themselves derived from public policy. First, Civil Code section 1668 states: 'All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.' 'Agreements whose object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced.' [Citation.] Second, Civil Code section 3513 states, 'Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.' [Citations.]" (*Armendariz, supra*, 24 Cal.4th at p. 100.) We concluded that the FEHA was enacted for public reasons and the rights it conferred on employees were unwaivable. (*Id.* at pp. 100-101.*)* We then concluded that the above requirements were necessary to enable an employee to vindicate these unwaivable rights in an arbitration forum.

A *Tameny* claim is almost by definition unwaivable. "[The] public policy exception to the at-will employment rule must be based on policies 'carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions . . . .'" (*Silo v. CHW Medical Foundation* (2002) 27 Cal.4th 1097, 1104.) Moreover, the public policy that is the basis for such a claim must be " ' "public"' in that it

' "affects society at large"' rather than the individual, must have been articulated at the time of discharge, and must be ' " 'fundamental'"' and ' " 'substantial.'"' " (*Ibid.*) Thus, a legitimate *Tameny* claim is designed to protect a public interest and therefore " 'cannot be contravened by a private agreement.'" (*Armendariz*, *supra*, 24 Cal.4th at p. 100.) In other words, an employment agreement that required employees to waive claims that they were terminated in violation of public policy would itself be contrary to public policy. Accordingly, because an employer cannot ask the employee to waive *Tameny* claims, it also cannot impose on the arbitration of these claims such burdens or procedural shortcomings as to preclude their vindication. Thus, the *Armendariz* requirements are as appropriate to the arbitration of *Tameny* claims as to unwaivable statutory claims.

Auto Stiegler cites *Brown v. Wheat First Securities, Inc.* (D.C. Cir. 2001) 257 F.3d 821 (*Brown*), which came to a contrary conclusion with respect to a claim for termination in violation of public policy under District of Columbia law. The court held that *Cole v. Burns International Security Services* (D.C Cir. 1997) 105 F.2d 1465 (*Cole*), a case on which *Armendariz* relied, and which set forth requirements for arbitrating claims under title VII of the Civil Rights Act of 1964 similar to the *Armendariz* requirements, should be limited to federal statutory claims, not state tort claims derived from common law. In *Brown*, an employee of a securities firm was allegedly terminated for alerting the Securities and Exchange Commission to illegal activities occurring at his employer's firm. He claimed to fall within the "whistleblower" exception to the employment-at-will rule under District of Columbia common law. He refused to participate in subsequent arbitration and moved to vacate the

arbitration award on the grounds that he was to be charged substantial arbitration fees, contrary to *Cole*.

The *Brown* court, which consisted of a different panel of the District of Columbia Circuit Court of Appeals than had decided *Cole*, began by reviewing the latter decision. As the *Brown* court summarized it, *Cole* acknowledged "that the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20, 111 S. Ct. 1647 (1991) [(*Gilmer*), had 'made clear that, as a general rule, statutory claims are fully subject to binding arbitration.' [citations][.] [But] we also noted that '*Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes,' [citation]. The arbitration agreement will be valid 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.' [Citations.] As to fees, we found that 'it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.' [Citation.] Accordingly we interpreted the arbitration agreement as requiring the employer to pay the arbitrator's fees." (*Brown*, *supra*, 257 F.3d at pp. 824-825.)

The *Brown* court, in rejecting the extension of *Cole* to nonstatutory claims, pointed to language in *Cole* limiting its holding to such claims. The court further stated: "We also see no basis for extending *Cole*. As we have explained, our central rationale — respecting congressional intent — does not extend beyond the statutory context. Moreover, by enacting the Federal Arbitration Act, Congress 'manifest[ed] a "liberal federal policy favoring arbitration agreements."'

[Citations]. The Act also pre-empted state restrictions on the enforcement of arbitration agreements. *Gilmer*, as we've seen, framed the question as whether dispute resolution under the FAA was consistent with the federal right-creating statute in question. [Citation.] For a common law claim under District of Columbia law, any such inconsistency would be resolved in favor of the only federal law involved, the FAA." (*Brown*, *supra*, 257 F.3d at pp. 825-826.)

We disagree with the *Brown* court, at least insofar as its decision would be interpreted to preclude extension of the *Armendariz* requirements to *Tameny* claims. First, although *Cole* was a Title VII case properly focused on mandatory arbitration of federal statutory rights, its rationale extends beyond that context generally to unwaivable rights conferred for a public benefit. The statement in *Gilmer* that provides the point of departure in *Cole* — "'by agreeing to arbitrate a statutory claim, [an employee] does not forgo the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial, forum'" (*Cole*, *supra*, 105 F.3d at p. 1481, quoting *Gilmer*, *supra*, 500 U.S. at p. 26) — would apply equally to nonstatutory public rights.

The *Brown* court's apparent position that only *federal* statutory rights may be subject to *Cole*'s requirements, because any attempt to place conditions on arbitration based on state law would be preempted by the Federal Arbitration Act (FAA), is incorrect. The FAA provides that arbitration agreements are "valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) Thus, "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with the text

of section 2 [of the FAA]." (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 685, italics omitted.) But under section 2 of the FAA, a state court may refuse to enforce an arbitration agreement based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." (*Doctor's Associates, Inc.*, *supra*, 517 U.S. at p. 687.) One such long-standing ground for refusing to enforce a contractual term is that it would force a party to forgo unwaivable public rights, as reviewed above. (See, e.g., *Baker Pacific Corp v. Suttles* (1990) 220 Cal. App. 3d 1148, 1153-1154 [mandatory employee waiver of all employer liability for asbestos exposure contrary to public policy].)[2]

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[2] We note the prohibition against exculpatory contracts contrary to public policy is generally invoked in the context of contracts of adhesion. (See, e.g., *Baker Pacific Corp v. Suttles, supra*, 220 Cal. App. 3d at p. 1151; *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 99-100, 32 Cal. Rptr. 33, 383 P.2d 441.) Thus, as with unwaivable statutory claims, special arbitration requirements for *Tameny* claims "would generally not apply in situations in which an employer and an employee knowingly and voluntarily enter into an arbitration agreement after a dispute has arisen. In those cases, employees are free to determine what trade-offs between arbitral efficiency and formal procedural protections best safeguard their . . . rights." (*Armendariz*, *supra*, 24 Cal.4th at p. 103, fn. 8.) Nor would our conclusion that waiver of the right is contrary to public policy preclude a party from settling a claim based on that right. (See, e.g., *Jefferson v. Department of Youth Authority (2002)* 28 Cal.4th 299, 48 P.3d 423, 121 Cal. Rptr. 2d 391 [approving an agreement and release settling a FEHA claim].)

Thus, while we recognize that a party compelled to arbitrate such rights does not waive them, but merely "submits to their resolution in an arbitral, rather than a judicial, forum" (*Gilmer*, *supra*, 500 U.S. at p. 26), arbitration cannot be misused to accomplish a de facto waiver of these rights. Accordingly, although the *Armendariz* requirements specifically concern arbitration agreements, they do not do so out of a generalized mistrust of arbitration per se (see *Doctor's Associates, Inc.*, *supra*, 517 U.S. at p. 687), but from a recognition that *some* arbitration agreements and proceedings may harbor terms, conditions and practices that undermine the vindication of unwaivable rights. The *Armendariz* requirements are therefore applications of general state law contract principles regarding the unwaivability of public rights to the unique context of arbitration, and accordingly are not preempted by the FAA. And, as discussed above, there is no reason under *Armendariz*'s logic to distinguish between unwaivable statutory rights and unwaivable rights derived from common law.

We recognize that "[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 10 (*Southland*).) The object of the *Armendariz* requirements, however, is not to compel the substitution of adjudication for arbitration, but rather to ensure minimum standards of fairness in arbitration so that employees subject to mandatory arbitration agreements can vindicate their public rights in an arbitral forum.

Specifically, with regard to arbitration costs at issue in this case and in *Brown*, the principle that arbitration costs may prevent arbitration claimants from effectively pursuing their public rights would apply with equal force to *Tameny* claims as to FEHA claims or to federal statutory claims. Nothing in the FAA prevents states from controlling arbitration costs imposed by adhesive contracts so that the remedy of prosecuting state statutory or common law public rights through arbitration is not rendered illusory. The *Armendariz* costshifting requirement is unique to arbitration only to the extent that arbitration, alone among contract provisions, may potentially require litigants to expend large sums to pay for the costs of the hearing that will decide his or her statutory other public rights. In other words, it is not the arbitration agreement itself but the imposition of arbitration forum costs that under certain circumstances violate state law.

Moreover, *Armendariz*'s cost rule does not "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." (*Southland*, *supra*, 465 U.S. at p. 10) Rather, we simply required that employers pay arbitration forum costs under certain circumstances as a condition of arbitration. Nothing in the United States Supreme Court case law leads us to believe that a state requirement shifting arbitration costs in mandatory employment agreements to the employer pursuant to established state law contract doctrine violates the FAA.

Furthermore, Code of Civil Procedure section 1284.2, which provides that each party pay a pro rata share of arbitration costs unless the agreement provides otherwise, does not alter our conclusion. We held in *Armendariz* that this statute does not preclude the judicial imposition of proportionally greater costs on the employer in the case of

FEHA claims. (*Armendariz, supra*, 24 Cal.4th at p. 112.) We reasoned that "the agreement to arbitrate a statutory claim is implicitly an agreement to abide by the substantive remedial provisions of the statute" and that the FEHA implicitly prohibited large arbitration costs that would stand as an obstacle to successfully pursuing rights conferred on the employee. (*Ibid.*) We similarly conclude that an agreement to arbitrate a claim of wrongful termination contrary to public policy must be interpreted to implicitly include an agreement to proportion costs in a manner that is reasonable for the employee/claimant, in order to prevent the de facto waiver of unwaivable rights contrary to Civil Code sections 1668 and 3513, discussed above. Code of Civil Procedure section 1284.2's default provision does not compel a contrary conclusion.

Therefore, we conclude that a plaintiff/employee seeking to arbitrate a *Tameny* claim should have the benefit of the same minimal protections as for FEHA claims as a means of ensuring that they can effectively prosecute such a claim in the arbitral forum.[3] These include the availability of damages

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[3] Auto Stiegler also cites *Brennan v. Tremco, supra*, 25 Cal. 4th 310 in support of its position that *Tameny* claims are not subject to the Armendariz requirements. In *Brennan*, we held that no suit for malicious prosecution may be maintained for an action that the parties resolve through contractual arbitration. In discussing the reasons for this rule, the court stated: " the nature of private arbitration does not always allow for a ready determination of whether or why the prior action actually terminated in the malicious prosecution plaintiff's favor. Except for statutory claims [citing *Armendariz*], an arbitrator need not explain the basis of an award." (*Brennan, supra*, at p. 317.) Brennan did not consider the extension of *Armendariz* to *Tameny* claims, and may not be relied

remedies equal to those available in a *Tameny* suit brought in court, including punitive damages (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 220); discovery sufficient to adequately arbitrate *Tameny* claim; a written arbitration decision and judicial review sufficient to ensure that arbitrators have complied with the law respecting such claims; and allocation of arbitration costs so that they will not unduly burden the employee.

We have already rejected the contentions that the arbitration agreement in the present case limited Little's remedies or his ability to obtain adequate judicial review. Nor is it evident from the agreement that Little will be unable to obtain adequate discovery. Little argues, however, that there is a risk of burdensome costs being imposed on him, contrary to *Armendariz*. We consider this arguments in the next part of our opinion.[4]

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upon by Auto Stiegler. (*People v. Superior Court (Zamudio)* (2000) 23 Cal. 4th 183, 198 ["' cases are not authority for propositions not considered'"].) Nor does our extension of *Armendariz* to *Tameny* claims undermine *Brennan*'s point that in most arbitrations, the arbitrator need not explain the basis for the award.

[4] Auto Stiegler argues that even if *Armendariz* is extended to *Tameny* claims, Little's complaint does not state facts sufficient to allege a *Tameny* cause of action. Neither the trial court nor the Court of Appeal addressed this issue, and we express no view on the matter. On remand, Auto Stiegler will have an opportunity to reassert this argument.

D. Cost Sharing and Arbitration of Tameny *Claims*

Little argues that the arbitration agreement's silence on the issue of costs means that he would be statutorily compelled to share costs under *Code of Civil Procedure section 1284.2* , and that the imposition of such costs renders the arbitration agreement unenforceable. *Armendariz* did not conclude that an arbitration agreement silent on costs was unenforceable. On the contrary, we held we would infer from such silence an agreement that "the employer must bear the arbitration forum costs" and that "the absence of specific provisions on arbitration costs would . . . not be grounds for denying the enforcement of an arbitration agreement." (*Armendariz*, *supra*, 24 Cal.4th at p. 113.)

The California Motorcar Dealers Association, amicus curiae on behalf of Auto Stiegler, argues that our holding on costs in *Armendariz* has been supplanted by the United States Supreme Court's holding in *Green Tree*, *supra*, 531 U.S. 79. Because the allocation of arbitration costs will be at issue on remand, we address the relationship between *Armendariz* and *Green Tree*.

In *Green Tree*, the plaintiff, purchaser of a mobile home, sued her lender on various federal statutory grounds, including violation of the Truth in Lending Act (TILA) (15 USC § 1601 et seq.) for failing to disclose certain finance charges. (*Green Tree*, *supra*, 531 U.S. at pp. 82-83.) The buyer's agreement with the lender contained a binding arbitration clause that included all statutory claims. The agreement was silent on the issue of who would pay the costs of arbitration. The district court granted the lender's motion to compel arbitration but the court of appeals reversed, holding that the agreement posed the risk that the plaintiff's

"ability to vindicate her statutory rights would be undone by 'steep' arbitration costs and therefore was unenforceable." (*Id.* 531 U.S. at p. 84.)

The United States Supreme Court reversed. It first reaffirmed its long-standing position that statutory claims are arbitrable under the FAA absent the expression of congressional intent "to preclude a waiver of judicial remedies for the statutory rights at issue." (*Green Tree, supra*, 531 U.S. at p. 90.) Finding no such expression in the TILA, the court proceeded to address the borrower's argument that silence on the matter of arbitration costs created an unacceptable risk that she might have to pay prohibitive costs and therefore not be able to vindicate her statutory rights through arbitration. The court stated: "It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, 'We lack . . . information about how claimants fare under Green Tree's arbitration clause.' The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." (*Id.* 531 U.S. at pp. 90-91, fns. omitted.)

The court further explained: "To invalidate the agreement on that basis would undermine the 'liberal federal policy favoring arbitration agreements.' [Citation.] It would also conflict with our prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue

are unsuitable for arbitration. [Citation.] We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. [Citation.] Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be *prohibitively expensive*, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden. How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point. The Court of Appeals therefore erred in deciding that the arbitration agreement's silence with respect to costs and fees rendered it unenforceable." (*Green Tree*, *supra*, 531 U.S. at pp. 91-92, italics added, fn. omitted.)

Although *Green Tree* was not an employment case, most courts interpreting it have done so in the employment context. These courts have arrived at divergent meanings of the "prohibitively expensive" standard. Some courts have interpreted that term narrowly and maintain that it does not affect the validity of the categorical position set forth in *Cole*, *supra*, 105 F.3d 1465 that the employer should pay the costs of a mandatory employment arbitration of statutory claims. (See. e.g., *Circuit City Stores v. Adams* (2002) 279 F.3d 889; *Cooper v. MRM Investment Company* (M.D. Tenn.) 199 F. Supp. 2d 771, 781; *Ball v. SFX Broadcasting, Inc.* (N.D.N.Y.) 165 F. Supp. 2d 230.) Other courts have held that *Green Tree* represents a departure from *Cole*'s categorical position, and requires a case-by-case analysis

based on such factors as the employee's ability to pay the arbitration fees and the differential between projected arbitration and litigation fees. (See, e.g., *Blair v. Scott Specialty Gases* (3d Cir. 2002) 283 F.3d 595, 609 (*Blair*); *Nelson v. Insignia/ESG, Inc.* (D.D.C. 2002) 215 F. Supp. 2d 143; *Bradford v. Rockwell Semiconductor Systems Inc.* (4th Cir. 2001) 238 F.3d 549 (*Bradford*).) Still other courts have held the information presented by the employee before arbitration was too speculative to warrant invalidation of the arbitration agreement, while retaining jurisdiction to reconsider the cost issue after arbitration. (See, e.g., *Mildworm v. Ashcroft* (E.D.N.Y. 2002) 200 F. Supp. 2d 171; *Boyd v. Town of Hayneville* (M.D. Alabama 2001) 144 F. Supp. 2d 1272.)

Armendariz and *Green Tree* agree on two fundamental tenets. First, silence about costs in an arbitration agreement is not grounds for denying a motion to compel arbitration. Second, arbitration costs can present significant barriers to the vindication of statutory rights. Nonetheless, there may be a significant difference between the two cases. Although *Green Tree* did not elaborate on the kinds of costsharing arrangements that would be unenforceable, dicta in that case, and several federal cases cited above interpreting it, suggest that federal law requires only that employers not impose "prohibitively expensive" arbitration costs on the employee (*Green Tree*, *supra*, 531 U.S. at p. 92), and that determination of whether such costs have been imposed are to be made on a case-by-case basis. *Armendariz*, on the other hand, categorically imposes costs unique to arbitration on employers when unwaivable rights pursuant to a mandatory employment arbitration agreement are at stake. Assuming that *Green Tree* and *Armendariz* pose solutions to the problem of

arbitration costs that are in some respects different, we do not agree with amicus curiae that the FAA requires states to comply with federal arbitration costsharing standards.

As reviewed in the previous part of this opinion, Armendariz's cost-shifting requirement is not preempted by the FAA. It is not a barrier to the enforcement of arbitration agreements, nor does it improperly disfavor arbitration in comparison to other contract clauses. Rather, it is derived from state contract law principles regarding the unwaivability of certain public rights in the context of a contract of adhesion. We do not discern from the United States Supreme Court's jurisprudence on FAA preemption a requirement that state law conform precisely with federal law as to the manner in which such public rights are protected.

Furthermore, we considered and rejected in *Armendariz* a case-by-case approach to arbitration costs similar to that suggested by courts interpreting *Green Tree* based on the differential between projected arbitration and litigation fees. (*Blair*, *supra*, 283 F.3d at p. 609; Bradford, *supra*, 238 F.3d at p. 556.) As we stated: "To be sure, it would be ideal to devise a method by which the employee is put in exactly the same position in arbitration, costwise, as he or she would be in litigation. But the factors going into that calculus refuse to admit ready quantification. Turning a motion to compel arbitration into a mini-trial on the comparative costs and benefits of arbitration and litigation for a particular employee would not only be burdensome on the trial court and the parties, but would likely yield speculative answers." (*Armendariz*, *supra*, 24 Cal.4th at p. 111.) The individualized consideration of employees' ability to pay arbitration costs that courts interpreting *Green Tree* contemplate (see *Blair*, *supra*, 283 F.3d at p. 609; *Bradford*, *supra*, 238 F.3d at p.

556) would further complicate the case-by- case calculation of prohibitive expense. We also rejected in *Armendariz* the notion that "there [would] be an advantage to apportioning arbitration costs at the conclusion of the arbitration rather than at the outset. Without clearly articulated guidelines, such a postarbitration apportionment would create a sense of risk and uncertainty among employees that could discourage the arbitration of meritorious claims." (*Armendariz, supra*, 24 Cal.4th at p. 111.) We see no reason to reevaluate these conclusions in light of *Green Tree* and its progeny.

In short, for reasons stated above, we do not believe that the FAA requires state courts to adopt precisely the same means as federal courts to ensure that the vindication of public rights will not be stymied by burdensome arbitration costs. We continue to believe that *Armendariz* represents the soundest approach to the problem of arbitration costs in the context of mandatory employment arbitration. We therefore conclude that on remand the court compelling arbitration should require the employer to pay in this case "all types of costs that are unique to arbitration." (*Armendariz, supra*, 24 Cal.4th at p. 113.)

III. DISPOSITION

The judgment of the Court of Appeal is reversed insofar as it (1) permits enforcement of a clause allowing arbitral review only of awards greater than $50,000 and (2) requires arbitration of Little's *Tameny* claim, assuming he has adequately alleged such a claim, without requiring Auto Stiegler to pay arbitration forum costs as set forth in *Armendariz*. The cause is remanded to the Court of Appeal with instructions to direct the superior court to conduct further proceedings consistent with the views expressed in this

opinion. In all other respects, the Court of Appeal's judgment is affirmed.

MORENO, J.

WE CONCUR: GEORGE, C. J.
KENNARD, J.
WERDEGAR, J.

CONCURRING AND DISSENTING OPINION BY BAXTER, J.

I agree with the majority that the "over $50,000" clause in the arbitration agreement was unconscionable, and therefore unenforceable, but was severable. On the other hand, I agree with Justice Brown that the special procedural rules for contractual arbitration of statutory claims, as set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*), should not be extended to so-called *Tameny* claims that an employee was wrongfully terminated in violation of public policy (see *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330).[1]

I also dissent from the majority's decision to retain rules, first announced in *Armendariz*, for allocation of the costs of mandatory arbitration of statutory claims.[2] In my view, intervening United States Supreme Court authority sharply undermines the soundness of *Armendariz*'s approach, and should prompt us to alter our analysis of the cost issue.

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[1] Throughout this opinion, I use the terms "contractual arbitration," "arbitration contract," and "arbitration clause" to refer to agreements for mandatory arbitration of disputes that may arise *in the future*. As the majority indicate, different considerations apply to parties' agreements to arbitrate disputes that have already arisen.

[2] I use the term "statutory claims" throughout the following discussion because, like Justice Brown, I would not extend the cost protections of *Armendariz* beyond rights arising directly from statute to other causes of action, such as *Tameny* claims, which the majority may consider "nonwaivable."

To recap briefly: Code of Civil Procedure section 1284.2[3] states that unless the arbitral parties agree otherwise, arbitration costs shall be shared pro rata. Though section 1284.2 is an implied term of every arbitration agreement silent on costs, *Armendariz* deemed it preempted in part by the need to ensure that financial considerations would not deter an employee who had agreed to mandatory arbitration from using that forum to pursue a statutory claim of discrimination under the Fair Employment and Housing Act (FEHA). To resolve this problem, *Armendariz* held that notwithstanding section 1284.2, and regardless of any particularized showing of hardship or need, FEHA impliedly requires an employer to pay all the employee's "forum costs" of contractual arbitration of a FEHA claim. (*Armendariz, supra*, 24 Cal.4th 83, 107-113.)

Thereafter, the United States Supreme Court decided *Green Tree Financial Corp.-ALA. v. Randolph* (2000) 531 U.S. 79, 148 L. Ed. 2d 373, 121 S. Ct. 513 (*Green Tree*). *Green Tree* held that where Congress has evinced no intent to limit the arbitrability of a particular federal statutory claim, a party seeking to avoid mandatory contractual arbitration of such a claim has the burden of showing that the costs of arbitration he is likely to incur will render that forum "prohibitively expensive." (*Id.* at p. 92.) To deny contractual arbitration on the mere risk of undue cost, said *Green Tree*, "would undermine the 'liberal federal policy favoring arbitration agreements . . .' [citation] [and] would also conflict with our prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue

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[3] All further unlabeled statutory references are to the Code of Civil Procedure.

are unsuitable for arbitration. [Citations.]" (*Id.* at p. 91.) Central to *Green Tree*'s analysis, of course, was the rule of the Federal Arbitration Act (FAA; 9 U.S.C. § 2.) that arbitration agreements involving interstate commerce may be invalidated only on grounds applicable to contracts generally. (*Green Tree*, *supra*, at p. 89.)

Despite *Green Tree*, the instant majority retain *Armendariz*'s "employer always pays" cost formula. The majority say *Green Tree* does not strictly require us to alter *Armendariz*'s application of California contract law to the issue of arbitration costs. On that technical point, the majority may or may not be correct. As *Green Tree* makes clear, however, the FAA, which governs both federal and state arbitration law, was adopted " 'to reverse the longstanding judicial hostility to arbitration agreements . . . and to place [such] agreements upon the same footing as other contracts.' " (*Green Tree*, *supra*, 531 U.S. 79, 89, quoting *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 24, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (*Gilmer*).) *Green Tree* holds in essence that even where the vindication of statutory rights is at stake, when courts interfere with an arbitration agreement by *presuming* undue cost to one party, they exhibit particular "hostility" and suspicion toward contractual arbitration, which the FAA was intended to prevent.

At direct odds with this principle is the current California requirement that the employer must always pay the employee's "forum costs" of arbitrating a statutory claim, regardless of actual need, and contrary to a California law that implies a cost-sharing term in every arbitration contract unless the parties expressly agree otherwise. I believe *Green Tree* warrants reconsideration of the *Armendariz* majority's views on cost allocation.

It should be noted that in articulating California's minimum requirements for mandatory contractual arbitration of statutory claims, *Armendariz* placed primary reliance on a federal case, *Cole v. Burns Intern. Security Services* (D.C. Cir. 1997) 323 U.S. App. D.C. 133, 105 F.3d 1465 (*Cole*). Among other things, *Cole* concluded that an employee could not be forced by contract to arbitrate federal statutory rights if also required to pay any part of the arbitrator's fee. (*Id. at* p. 1485.) *Armendariz* quoted with approval *Cole*'s assertion that in *Gilmer*, *supra*, 500 U.S. 20, the high court had " 'endorsed a system of [mandatory contractual] arbitration [of federal statutory claims] in which employees are not required to pay for the arbitrator [and] there [was] no reason to think that the Court would have approved arbitration in the absence of this arrangement.' "(*Armendariz*, *supra*, 24 Cal.4th 83, 107-108, quoting *Cole*, *supra*, 105 F.3d at p. 1484.)[4] *Green Tree* has since destroyed that assumption. While the *Green Tree* majority did not expressly disapprove *Cole*, they essentially negated *Cole*'s conclusions about the cost-sharing requirements of a valid scheme for arbitration of federal statutory claims.

Under the circumstances, I would overrule *Armendariz*'s arbitrary cost allocation formula. In its place, I would adopt *Green Tree*'s principle that if a party resists mandatory contractual arbitration of a statutory claim on grounds of

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[4] *Cole* conceded that cost allocation was not an issue in *Gilmer*, *supra*, 500 U.S. 20. This, *Cole* explained, was because the arbitration in *Gilmer*, between a brokerage firm and its employee, was subject to a standard securities industry practice that the employer pays the arbitrator's fees. (*Cole, supra*, 105 F.3d 1465, 1483.)

undue cost, he must make a timely, particularized showing of the expected expense, and must also demonstrate that, in his particular case, this cost would make arbitration prohibitively expensive as compared to court litigation. Evidence on this issue could be presented to the court deciding a motion to compel arbitration. If the party opposing arbitration demonstrated prohibitive expense, the court could grant the motion to compel upon the condition that the proponent of arbitration accept, with the caveat discussed below, a more equitable allocation of costs.

I close with one final point. In light of the strong policy favoring arbitration on the terms agreed by the parties, interference with the arbitration contract's cost provisions, express or implied by statute, should be countenanced only to the degree actually necessary to assure that mandatory resort to the arbitral forum has not deterred vindication of a statutory claim. For this reason, whatever pre- arbitration reallocation of costs may be necessary to ensure that the claimant is not deterred in advance, this allocation should be tentative only, and should be subject to readjustment once the true expenses and rewards of the arbitral proceeding are known.

In hindsight, it may become apparent that the actual costs of arbitration, with its faster, simpler, and more economical procedures, were less than the probable expenses of resolving the same claim in court. Even if they were greater, the difference may prove so minimal, given the claimant's general financial ability or the magnitude of his final recovery, that forcing the other party to absorb all the claimant's forum costs, contrary to their agreement, is an unfair interference with contractual arbitration. Under these circumstances, the party who "fronted" costs for the claimant

should be reimbursed for the excess.

I see no reason why the arbitrator cannot, subject to appropriate judicial review, reassess the cost allocation at the conclusion of the proceedings.[5] "When apportioning costs, the arbitrator should consider the magnitude of the costs unique to arbitration, the ability of the employee to pay a share of these costs, and the overall expense of the arbitration as compared to a court proceeding." (*Armendariz*, *supra*, 24 Cal.4th 83, 129 (conc. opn. of Brown, J.).) As indicated above, the amount actually recovered by the claimant in arbitration should also be a relevant consideration. "Ultimately, any apportionment should ensure that the costs imposed on the employee, if known at the onset of litigation, would *not* have deterred her from enforcing her statutory rights or stopped her from effectively vindicating these rights. [Citation.]" (*Ibid.*)

Believing *Armendariz* was dispositive, the employee in this case (Little) never sought to make a showing of prohibitive expense. Believing *Green Tree* was dispositive, the Court of Appeal simply held that the arbitration agreement's silence on costs was no bar to its unconditional enforcement. As I have indicated, I would overrule *Armendariz* to the extent it is inconsistent with *Green Tree*.

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[5] I assume that when granting a motion to compel contractual arbitration (§ 1281.2), the superior court could condition its order *both* on a tentative reallocation of costs, and on the parties' agreement that the court would retain power to review any readjustment later ordered by the arbitrator. Moreover, a power to review cost readjustments should also be within the court's jurisdiction in the event either party moves to vacate the arbitration award. (§ 1285 et seq.)

Thus, if I believed Little's *Tameny* claim was entitled to *Armendariz* protections, I would support a remand to allow Little to make the requisite showing.

I would reverse the judgment of the Court of Appeal insofar as it permits enforcement of a clause allowing arbitral review only of awards greater than $50,000, and would affirm the Court of Appeal's judgment in all other respects. If I agreed with the majority that *Armendariz* protections apply to *Tameny* claims--which I do not--I would additionally reverse the Court of Appeal's judgment insofar as it requires Little to arbitrate this claim without allowing him to demonstrate that pro rata sharing of forum costs would make arbitration prohibitively expensive for him, and I would remand to the Court of Appeal with directions to instruct the trial court to conduct further proceedings consistent with the views expressed in this opinion.

BAXTER, J.

WE CONCUR:

CHIN, J.
BROWN, J.

CONCURRING AND DISSENTING OPINION BY BROWN, J.

Like the majority, I find the appellate arbitration provision in the arbitration agreement unconscionable. (Maj. opn., *ante*, at p. 2.) I also agree that this "provision should be severed and the rest of the arbitration agreement enforced." (*Ibid.*) I, however, disagree with the majority's application of the requirements set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (Armendariz) to an action alleging wrongful termination in violation of public policy (*Tameny* claim) (see *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330).[1] Unlike the majority, I found *Brown v. Wheat First Securities, Inc.* (2001) 347 U.S. App. D.C. 228, 257 F.3d 821 (*Brown*) persuasive and would not apply *Armendariz* to *Tameny* claims.

"In *Armendariz*, we held that arbitration of claims under the [California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.)] is subject to certain minimal requirements . . . ." (Maj. opn., *ante*, at p. 12.) We imposed these requirements despite the preemptive scope of the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) based on "the United States Supreme Court's dictum that a party, in agreeing to arbitrate a statutory claim, 'does not forgo the substantive rights afforded by the statute [but] only submits to their resolution in an arbitral . . . forum.' " (*Armendariz*,

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[1] For the reasons stated in Justice Baxter's concurring and dissenting opinion, *ante*, I also disagree with the majority's refusal to modify *Armendariz*'s cost requirements in light of *Green Tree Financial Corp. v. Randolph* (2000) 531 U.S. 79, 148 L. Ed. 2d 373, 121 S. Ct. 513.

supra, 24 Cal.4th at p. 99, quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (*Mitsubishi*).) Because the Legislature enacted FEHA with the express intention of safeguarding certain rights for the benefit of the public at large, we concluded that neither federal nor state arbitration laws preclude our imposition of restrictions on the arbitration of FEHA claims. (See *Armendariz, supra*, 24 Cal.4th at pp. 100-101.) In doing so, we carefully limited our holding to arbitrations of *statutory* claims.

Our heavy reliance on *Cole v. Burns Intern. Security Services* (D.C. Cir. 1997) 323 U.S. App. D.C. 133, 105 F.3d 1465 (*Cole*) demonstrates the limited scope of our holding in *Armendariz*. (See *Armendariz, supra*, 24 Cal.4th at pp. 101-102.) In *Cole*, the District of Columbia Circuit Court of Appeals imposed the same requirements we imposed in *Armendariz* (*Cole/Armendariz* requirements) to the arbitration of claims under title VII of the Civil Rights Act of 1964 (Title VII). (*Cole, supra, 105 F.3d at p. 1482.)* It imposed these requirements because of the importance of respecting *congressional* intent as expressed in "public statutes like the [Age Employment in Discrimination Act] and Title VII." (*Cole*, at p. 1482.) Ascertaining the unwaivability of the rights conferred by these public statutes from their text, history, and purpose and citing this unwaivability as evidence of congressional intent, the court found that Congress intended to provide certain procedural protections to employees seeking to vindicate these rights. (*Ibid.*) Thus, *Cole* did not impose additional requirements on the arbitration of these statutory claims based solely on their unwaivability or public policy concerns.

The District of Columbia Circuit Court of Appeals made this expressly clear in *Brown*. In *Brown*, the court refused to impose the *Cole/Armendariz* requirements on the arbitration of a common law claim virtually identical to the *Tameny* claim at issue here. (*Brown*, *supra*, 257 F.3d at p. 825.) As the court explained, *Cole* was limited "at vital points to statutory rights" (*Brown*, 257 F.3d at p. 825), and "our central rationale--respecting congressional intent--does not extend beyond the statutory context" (*ibid.*). The court further noted that the FAA preempts "state restrictions on the enforcement of arbitration agreements" and necessarily precludes courts from restricting the arbitration of common law claims. (*Brown*, at p. 826.) Finally, the court observed that the creation of judicially crafted public policy exceptions to the FAA would, as a practical matter, subject the arbitration of most, if not all, tort and contract claims to the *Cole/Armendariz* requirements. (*Ibid.*)

Notwithstanding the majority's arguments to the contrary, I believe *Brown* should guide our decision here. As explained above, we carefully limited the application of *Armendariz* to statutory rights. (See *ante*, at pp. 1-2.) And our rationale for imposing the *Cole/Armendariz* requirements on the arbitration of FEHA claims--respecting legislative intent--does not extend beyond the statutory context. (See *ibid.*)

Indeed, we are precluded from doing so by both Congress and our own Legislature. Congress enacted the FAA " 'to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined . . . by state courts . . . .' " (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 13, 79 L. Ed. 2d 1, 104 S. Ct. 852.) Recognizing "the widespread unwillingness of state courts to enforce arbitration agreements" (*ibid.*),

Congress intended the FAA "to be a broad enactment appropriate in scope to meet the large problems Congress was addressing" (465 U.S. at p. 14)--i.e., judicial hostility to arbitration--and "unencumbered by state law constraints" (*id.* 465 U.S. at p. 13). As such, the FAA preempts all state laws and rules disfavoring arbitration. (See *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 272, 130 L. Ed. 2d 753, 115 S. Ct. 834.)

Of course, Congress is free to circumscribe the scope of its enactments. (*Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220, 226, 96 L. Ed. 2d 185, 107 S. Ct. 2332.) Consistent with this principle, the United States Supreme Court has recognized that the FAA does not govern if " 'Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.' " (*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (*Gilmer*), quoting *Mitsubishi*, *supra*, 473 U.S. at p. 628.) Such an intention may, however, be discerned *only* from "the text [of a federal statute], its legislative history, or an 'inherent conflict' between arbitration and" that statute's underlying purposes. (*Gilmer*, *supra*, 500 U.S. at p. 26, quoting *McMahon*, *supra*, 482 U.S. at p. 227.) Thus, in the absence of a statute evidencing a clear congressional intent to restrict arbitration, the FAA controls and precludes courts from imposing their own arbitration-specific restrictions.[2] (See *Mastrobuono v.*

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[2] We have extended this rationale of *Gilmer* to state legislative enactments and restricted the arbitration of certain statutory causes of action serving a transcendent public purpose as determined by a state legislature. (See *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1083, 988 P.2d 67, 90 Cal. Rptr. 2d 334

Shearson Lehman Hutton, Inc. (1995) 514 U.S. 52, 55, 58, 131 L. Ed. 2d 76, 115 S. Ct. 1212 (*Mastrobuono*) [holding that the FAA precludes the enforcement of a *judicially created rule* despite its basis in public policy]; see also *McMahon*, *supra*, 482 U.S. at p. 227 [to defeat application of the FAA, the parties opposing arbitration "must demonstrate that Congress intended to make an exception to the [FAA] for claims arising under" statute, "an intention discernible from the text, history, or purposes of the statute"].)

Similarly, California's arbitration scheme precludes California courts from restricting arbitrations in the absence of an express legislative intent to do so. "Title 9 of the Code of Civil Procedure . . . represents a comprehensive statutory scheme regulating private arbitration in this state." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9, 832 P.2d 899, 10 Cal. Rptr. 2d 183.) This scheme establishes "that arbitration agreements will be enforced *in accordance with their terms*." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 836, fn. 10, 982 P.2d 229, 88 Cal. Rptr. 2d 366.) Absent certain statutorily enumerated grounds not relevant here (see Code Civ. Proc., § 1281.2), courts must enforce an arbitration agreement *as written*. While the Legislature may create exceptions to this strong statutory policy in favor of arbitration and selectively limit arbitrations, we may not. (See *Armendariz, supra*, 24 Cal.4th at p. 98

(*Broughton*).) While I reluctantly concede that *Broughton* is binding until the United States Supreme Court decides otherwise (but see *Broughton, supra*, 1066, 1088-1103 (dis. opn. of Chin, J.)), neither this court nor the United States Supreme Court has ever suggested that a federal or state court may, on its own initiative, restrict the arbitration of a common law cause of action.

[recognizing that the Legislature may "selectively prohibit[] arbitration in certain areas"].)

Nonetheless, the majority does just that. A *Tameny* claim is a common law cause of action created by this court--and not by the Legislature. (See *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71, 960 P.2d 1046, 78 Cal. Rptr. 2d 16 (*Green*) ["Although our Legislature has determined that an employment contract is generally terminable at either party's will . . ., *we have created a narrow exception to this rule* by recognizing that an employer's right to discharge an at-will employee is subject to limits that fundamental public policy imposes." (Italics added, fn. omitted.)].) Thus, *Tameny* claims are a judicial--and not a legislative--construct, and the public policy underlying these claims "is inconsequential as a measure of [the Legislature's] interest in the stated policy." (*Brown, supra*, 257 F.3d at p. 826.) As a result, the majority's extension of *Armendariz* violates the FAA and our own statutory arbitration scheme.

The statutes the majority cites to establish the unwaivability of *Tameny* claims are inapposite. Civil Code section 3513, by its terms, applies only to laws enacted by the Legislature. Meanwhile, *Civil Code section 1668* merely declares that contracts that "directly or indirectly . . . exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against" public policy. An arbitration agreement does not, however, exempt anyone from responsibility for his or her wrongdoing. Rather, the agreement merely changes the forum in which the determination of responsibility is made. (See *Gilmer, supra,* 500 U.S. at p. 26 [parties compelled to arbitrate their claims merely " 'submit[] to their resolution in an arbitral, rather

than a judicial, forum' "].) Thus, Civil Code section 1668 does not evince a legislative intent to impose any restrictions on the arbitration of *Tameny* claims.

In any event, the majority's focus on the unwaivability of *Tameny* claims is misplaced. To evade FAA preemption, the majority purports to apply a generally applicable contract defense by "refusing to enforce a contractual term . . . that . . . would force a party to forgo unwaivable public rights . . . ." (Maj. opn., *ante*, at p. 16.) Thus, the majority sees "no reason under *Armendariz*'s logic to distinguish between unwaivable statutory rights and unwaivable rights derived from common law." (*Id.* at p. 17.) The majority's logic, however, is specious. The majority finds an agreement to arbitrate *Tameny* claims violative of public policy absent satisfaction of the *Cole/Armendariz* requirements *solely* because of alleged deficiencies unique to an arbitral forum established by an otherwise valid agreement. In doing so, the majority necessarily premises its holding on plaintiff's purported inability to vindicate his common law claim in the arbitral forum and creates a rule specific to arbitration agreements. As such, the majority's holding rests on a "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" rejected long ago. (*Rodriguez de Quijas v. Shearson/Am. Exp.* (1989) 490 U.S. 477, 481, 104 L. Ed. 2d 526, 109 S. Ct. 1917.) This is true regardless of whether the claim is waivable or not.

Thus, the unwaivability of *Tameny* claims is a red herring. The crucial question is whether there is any evidence of a congressional (see *Gilmer*, *supra*, 500 U.S. at p. 26) or legislative intent (see *Broughton*, *supra*, 21 Cal.4th at p. 1083) to place restrictions on the arbitration of *Tameny*

claims. While the unwaivability of a statutory right established by the statute's text, history, or purpose may evidence such an intent (see *Cole*, *supra*, 105 F.3d at p. 1482; *Armendariz*, *supra*, 24 Cal.4th at p. 100), a judicial finding of unwaivability for public policy reasons cannot. Indeed, the public policy exception the majority adopts subjects most, if not all, tort claims to the *Cole/Armendariz* requirements. "All claims not based on contract--including, for example, . . . defamation and tortious interference claims . . . --implement values that society has in one way or another thought deserving." (*Brown*, *supra*, 257 F.3d at p. 826.) Under this public policy rationale, "it is hard to see what falls outside it." (*Ibid.*) For example, under the majority's logic, any arbitration of an intentional tort claim must abide by the *Cole/Armendariz* requirements because such claims are unwaivable under *Civil Code section 1668*.

In this respect, this case is no different from *Mastrobuono*. In *Mastrobuono*, the United States Supreme Court held that the FAA preempted a judicially created rule prohibiting arbitrators from awarding punitive damages even though a state court created the rule for public policy reasons. (*Mastrobuono*, *supra*, 514 U.S. at pp. 55, 58.) The same reasoning precludes our application of the judicially created *Cole/Armendariz* requirements to the arbitration of *Tameny* claims. By creating a rule applicable only to arbitration provisions, the majority necessarily violates the FAA. (See *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687 ["Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions"].)

Our extension of *Armendariz* to *Tameny* claims therefore usurps Congress's authority to establish "the supreme law of

the land" (U.S. Const., art. VI, cl. 2) and the Legislature's "responsibility to declare the public policy of the state" (*Green, supra*, 19 Cal.4th at p. 71). Moreover, by imposing arbitration-specific restrictions that have no congressional or legislative basis, the majority not only undermines the "liberal federal policy favoring arbitration" (*Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927), but also contravenes California's "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution" (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322, 197 Cal. Rptr. 581, 673 P.2d 251). Even if *Tameny* claims cannot be effectively vindicated absent imposition of the *Cole/Armendariz* requirements, both Congress and our Legislature have declined to impose them. By disregarding their intentions, the majority appears intent on turning "the judicial clock backwards to an era of hostility toward arbitration." (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 714, 131 Cal. Rptr. 882, 552 P.2d 1178.) Indeed, this court appears to be "chipping away at" United States Supreme Court precedents broadly construing the scope of the FAA "by indirection," despite the high court's admonition against doing so. (*Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 122, 149 L. Ed. 2d 234, 121 S. Ct. 1302.) I therefore urge the high court to clarify once and for all whether our approach to arbitration law comports with its precedents.

BROWN, J.

WE CONCUR:

BAXTER, J.
CHIN, J.

APPENDIX B

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

No. B147003

[Filed September 17, 2001]

ALEXANDER M. LITTLE,
Plaintiff and Respondent,
v.
AUTO STIEGLER, INC.,
Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Super. Ct. No. BC230809. S. Patricia Spear, Judge.

JUDGES:
TURNER, P.J., ARMSTRONG, J., WILLHITE, J.*

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION

I. Introduction

Auto Stiegler, Inc. (defendant) appeals from an order denying its motion to compel arbitration of an action for tortious demotion and termination brought by Alexander M. Little (plaintiff). The trial court held the arbitration agreement was unconscionable and hence unenforceable under *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 113-127 (hereafter *Armendariz*). The complaint contains no statutory claims as was the case in *Armendariz*. Based on the language in *Armendariz* and the Supreme Court's discussion in *Brennan v. Tremco Inc.* (2001) 25 Cal. 4th 310, 317, we conclude the arbitration clause is enforceable in a case involving no statutory claims and the order under review is reversed.

II. Background

Plaintiff signed three nearly identical arbitration agreements while employed by defendant. The most recent of the three stated as follows: "I agree that any claim, dispute, or controversy (including, but not limited to, any and all claims of discrimination and harassment) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, and officers, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with, the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in

conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. Sec 1280 et seq., including section 1283.05 and all of the act's other mandatory and permissive rights to discovery); provided, however, that: In addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure section 631.8. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis other than such controlling law, including but not limited to, notions of 'just cause.' As reasonably required to allow full use and benefit of this agreement's modifications to the act's procedures, the arbitration shall extend the times set by the act for the giving of notices and setting of hearings. Awards exceeding $ 50,000.00 shall include the arbitrator's written reasoned opinion and, at either party's written request within 20 days after issuance of the award, shall be subject to reversal and remand, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial. I understand by agreeing to this binding arbitration provision, both I and the Company give up our rights to trial by jury."

Plaintiff filed an action against defendant alleging he was demoted and subsequently terminated after he reported that certain employees were engaging in warranty fraud. Plaintiff's causes of action were for: tortious demotion in violation of public policy; tortious termination in violation of public policy; breach of an implied contract of continued employment; and breach of the implied covenant of good faith and fair dealing. In the first through third causes of action, plaintiff sought compensatory and punitive damages. In the fourth cause of action, plaintiff sought only contract breach damages. Plaintiff sought no relief under the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12900 et seq.)

Defendant's initial motion to compel arbitration was granted. Following the Supreme Court's decision in *Armendariz,* the trial court, upon plaintiff's request for reconsideration, denied defendant's motion to compel arbitration. The trial court ruled: "The court believes that the arbitration clause in issue does not meet the standards set forth by the Supreme Court and it should not be enforced. The clauses of the arbitration agreement that do not comport with the requirements of the Armendariz [decision] include the clauses that: [P] 1. Require the Plaintiff to share the costs; ¶ 2. Provide for no judicial review. The court deems this fatal, as judicial review of all decisions is not the same as limited review by another arbitrator of only certain awards; ¶ 3. Limit the remedies available to the complaintant [*sic*] [to] possibly exclude equitable as opposed to legal remedies, to which he might otherwise be entitled. ¶ 4. Lack of mutuality of remedy, in that this clause, unlike the one in Armendariz does not obviously bind the employer to likewise enforce its

right in the arbitration forum." Defendant filed a timely notice of appeal.

III. Discussion

A. Standard of Review

The present case involves the application of the United States Arbitration Act. The arbitration agreement involves an employment contract in commerce and it explicitly indicates that it is to be "submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act" subject to the procedures of the California Arbitration Act. (9 U.S.C. § 2; *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, ___ [121 S. Ct. 1302, 1307].) As such, subject to defenses applicable in all contract disputes including that of unconscionability, the arbitration agreement must be enforced according to its terms. (*Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University* (1989) 489 U.S. 468, 477-478; *Warren-Guthrie v. Health Net* (2000) 84 Cal. App. 4th 804, 813.)

When, as here, no extrinsic evidence has been introduced, the validity of an arbitration clause is a question of law. (*24-Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal. App. 4th 1199, 1212; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal. App. 4th 1519, 1527.) We are not bound by the trial court's construction of the agreement. (*24- Hour Fitness, Inc. v. Superior Court, supra*, 66 Cal. App. 4th at p. 1212; *Stirlen v. Supercuts, Inc., supra*, 51 Cal. App. 4th at p. 1527.) Our review is de novo. (*24- Hour Fitness, Inc. v. Superior Court, supra*, 66 Cal. App. 4th at p. 1212; *Stirlen v. Supercuts, Inc., supra*, 51 Cal. App. 4th at p. 1527.) Further, as the Court of Appeal explained in *24- Hour Fitness, Inc. v. Superior Court, supra*, 66 Cal. App. 4th at pages 1214-1215: "We view the

cited clauses in light of the standard rules of contract interpretation. 'An interpretation which gives effect is preferred to one which makes void.' (Civ. Code, § 3541.) If it may be done without violating the parties' intent, we must interpret the contract in such a way as to make it 'lawful, operative, definite, reasonable, and capable of being carried into effect.' (Civ. Code, § 1643.) Particularly where the contract is one of adhesion, ambiguity in the contract language not dispelled by application of other canons of construction is interpreted against the drafter. (Civ. Code, § 1654; *Neal v. State Farm Ins. Cos.* (1961) 188 Cal. App. 2d 690, 695, [].) Finally, because of the strong public policy in favor of arbitration, 'courts will "'indulge every intendment to give effect to such proceedings.'" [Citation.]' (*Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 9 [].)" As the Supreme Court held in *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal. 3d 807, 819, footnote 16, an arbitration case: "The rule requiring the resolution of ambiguities against the drafting party 'applies with peculiar force in the case of a contract of adhesion . . . .' (*Neal v. State Farm Ins. Cos., supra*, 188 Cal. App. 2d 690, 695.)"

B. *Armendariz*

In *Armendariz,* the Supreme Court held certain minimum requirements must be met in order for arbitration to be an adequate forum for the vindication of nonwaivable statutory rights under the FEHA. (*Armendariz*, supra, 24 Cal. 4th at p. 100.) The court found the Legislature had enacted the FEHA "'for a public reason.'" (*Ibid.*) The Supreme Court concluded that vindication of FEHA rights in arbitration requires "neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration."

(*Id.* at pp. 90-91; *Camargo v. California Portland Cement Co.* (2001) 86 Cal. App. 4th 995, 1019, fn. 8, 103 Cal. Rptr. 2d 841.) After articulating these five implied elements of every agreement to arbitrate a FEHA claim, the Supreme Court went on to discuss unconsionability in general stating, "In the previous section of this opinion, we focused on the minimum requirements for the arbitration of unwaivable statutory claims. In this section, we will consider objections to arbitration that apply more generally to any type of arbitration imposed on the employee by the employer as a condition of employment, regardless of the type of claim being arbitrated. These objections fall under the rubric of 'unconscionability.'" (*Armendariz, supra*, 24 Cal. 4th at p. 113.) We will first discuss the five minimum requirements under *Armendariz* for an agreement to arbitrate a FEHA claim and their application to this case. We then turn to the question of unconscionability.

1. Five Minimum Requirements Under *Armendariz*

The five minimum requirements for arbitration of nonwaivable FEHA claims discussed in *Armendariz* are inapplicable here. Plaintiff has not alleged a FEHA cause of action or any other statutory claim. Therefore, unlike the *Armendariz* court, we are not concerned with vindication in arbitration of plaintiff's FEHA claims or any other nonwaivable statutory rights. No statutory claims are present in this case. Hence, the alleged absence of the five minimum requirements in *Armendariz* is not a ground for invalidating the arbitration clause in this case. (See *Brennan v. Tremco Inc., supra*, 25 Cal. 4th at p. 317 ["Except for statutory claims, [citation], an arbitrator need not explain the basis of an award"].) Therefore, the purported absence of the five

minimum *Armendariz* requirements is not a ground for invalidating the present arbitration clause.

2. Unconscionability Under *Armendariz*

The trial court found the present arbitration agreement was unenforceable because of a "lack of mutuality of remedy[.]" The trial court concluded the agreement did not bind defendant to enforce *its* rights in arbitration. *Armendariz* held, "regardless of the type of claim being arbitrated," a contract of adhesion will not be enforced if it is unconscionable. (*Armendariz, supra*, 24 Cal. 4th at p. 113.) Moreover, an arbitration agreement is substantively unconscionable if it requires only the employee, but not the employer, to arbitrate claims. (*Armendariz, supra*, 24 Cal. 4th at pp. 115-121, accord *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal. App. 4th 1322, 1332.) Absent a reasonable justification based on "'business realities'" such "lack of mutuality" is unconscionable. (*Armendariz, supra*, 24 Cal. 4th at p. 117; *Stirlen v. Supercuts, Inc., supra*, 51 Cal. App. 4th at p. 1536.) In the case of an agreement to arbitrate imposed by an employer on an employee, it is not enough that the employer agrees to be bound by arbitration of the employee's job-related disputes. (*Armendariz, supra*, 24 Cal. 4th at p. 118.)

The arbitration agreement at issue in *Armendariz* was limited in scope to employee claims regarding wrongful termination. (*Armendariz, supra*, 24 Cal. 4th at p. 120.) It stated: "'I agree as a condition of my employment, that in the event my employment is terminated, and I contend that such termination was wrongful or otherwise in violation of the conditions of employment or was in violation of any express or implied condition, term or covenant of employment,

whether founded in fact or in law, including but not limited to the covenant of good faith and fair dealing, or otherwise in violation of any of my rights, I and Employer agree to submit any such matter to binding arbitration . . . ." (*Id.* at pp. 91-92.) The *Armendariz* agreement did not expressly authorize the employer to litigate rather than arbitrate its claims against the employee. Nevertheless, this one-sided right to compel arbitration by the employer only, the Supreme Court concluded, was the "clear implication of the agreement." (*Armendariz, supra*, 24 Cal. 4th at p. 120.) The Supreme Court noted: "Obviously, the lack of mutuality can be manifested as much by what the agreement does not provide as by what it does. [Citation.]" (*Ibid.*)

The present agreement is materially distinguishable from that in *Armendariz*. Here, the agreement states: "*I agree* that *any claim, dispute, or controversy* (including, but not limited to, any and all claims of discrimination and harassment) which would otherwise require or allow resort to any court or other governmental dispute resolution forum *between myself and the Company* (or its owners, directors, and officers, and parties affiliated with its employee benefit and health plans) *arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with, the Company,* whether based on tort, contract, statutory, or equitable law, or otherwise, shall be submitted to and determined exclusively by binding arbitration . . . . I understand by agreeing to this binding arbitration provision, *both I and the Company give up our rights to trial by jury.*" (Italics added.) Unlike the *Armendariz* contract, this agreement is not reasonably susceptible of a conclusion defendant is not bound to arbitrate its claims against plaintiff. It requires that "any claim,

dispute, or controversy . . . between myself and the Company . . . arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with, the Company" shall be arbitrated. It further specifies that both plaintiff and defendant "give up [their] rights to trial by jury." Under the plain terms of this agreement, both plaintiff and defendant are required to arbitrate any dispute having any relationship or connection between them. Finally, no damage limitation of any type appears in the agreement.

There is no merit to plaintiff's argument only he was bound by the arbitration clause. The agreement is on defendant's stationary. The arbitration agreement was given originally to plaintiff along with an employee handbook which stated, "We intend for this handbook to offer two-way communications: what you expect from us, and what we expect from you." An employee handbook may be utilized in construing the terms of an employment relationship. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 340 [employee handbook relevant in construing power to terminate at will]; *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681-682 [employer personnel manual relevant to existence of implied terms of employment relationship]; *Romo v. Y-3 Holdings, Inc.* (2001) 87 Cal. App. 4th 1153, 1159-1160 [employee never agreed to be bound by arbitration agreement in severable portion of employee handbook]; *Hill v. City of Long Beach* (1995) 33 Cal. App. 4th 1684, 1692 [municipal employee's employment rights determined by reference to city charter, civil service rules, and employee handbook].) Further, any doubts as to whether defendant would be bound by the agreement it provided on its own stationary along with the employee handbook would be resolved in favor of

arbitration. (*Moncharsh v. Heily & Blase, supra*, 3 Cal. 4th at p. 9; *Christensen v. Dewor Developments* (1983) 33 Cal. 3d 778, 782.)

3. Costs of Arbitration

Plaintiff argues that the requirement that he pay a pro rata share of the costs of arbitration renders the agreement unconscionable. Because the arbitration clause is silent on the subject, Code of Civil Procedure section 1284.2 requires plaintiff to pay his pro rata share of the arbitration.[1] Plaintiff presented no evidence to support this contention concerning the costs of arbitration. He presented no evidence of the costs of arbitration nor his alleged inability to pay such expenses. He presented no evidence to show that he would pay more to arbitrate than to undergo the costs of litigating in a courtroom. Under these circumstances, this case, one not involving a statutory claim, is best analogized to the decision of *Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 90-91, where the United States Supreme Court addressed an argument that the costs of arbitration arising in connection with a federal civil rights claim rendered the agreement unconscionable as follows: "It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not

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[1] Code of Civil Procedure section 1284.2 states, "Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit."

show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, 'we lack . . . information about how claimants fare under Green Tree's arbitration clause.' [*Randolph v. Green Tree Financial* (11th Cir. 1999)] 178 F.3d [1149,] 1158. The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement. To invalidate the agreement on that basis would undermine the 'liberal federal policy favoring arbitration agreements.' [Citation.]" (Fn. omitted.) *Green Tree Financial Corp.* is a decision construing the United States Arbitration Act and as such is useful in construing California arbitration proceedings. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal. 4th 951, 971-972 [United States Arbitration Act policies providing for presumption in favor of arbitrability and requirement that agreements to arbitrate be construed on basis of state law contract principles applied to health insurance agreement]; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal. 4th 394, 408 ["[I]t follows that a state procedural statute or rule that frustrated the effectuation of [9 U.S.C. §] 2's central policy would, where the federal law applied, be preempted by the [United States Arbitration Act]"].) Based on this record, there is no merit to the argument that the statutory requirement that plaintiff pay his share of arbitration costs in connection with his non-statutory claims, which involve the entirety of his lawsuit, renders the agreement to arbitrate unconscionable in this case which is subject to the United States Arbitration Act.

Plaintiff argues that this case is controlled by *Cole v. Burns International Security Services* (D. C. Cir. 1997) 323 U.S. App. D.C. 133, 105 F.3d 1465, 1483-1485, where the Court of Appeals for the District of Columbia Circuit held that an employee could not be required to pay the costs of arbitration of statutory claims. Because the arbitration clause in *Cole* was silent on the issue of cost allocation, the Court of Appeals construed the employment contract to require the employer to pay all of the arbitrators' costs in a claim premised upon the employee's statutory claims. *Cole* did not invalidate the arbitration agreement. (*Id.* at 1484-1485.)

In *Armendariz*, the California Supreme Court adopted the analysis of *Cole* and the majority of courts that have considered the issue in connection with an employee's statutory claims. (*Armendariz v. Foundation Health Psychcare Services, Inc., supra*, 24 Cal. 4th at pp. 110-111.) However, as noted previously, the present case involves *no* statutory claims. The *Armendariz* cost-shifting analysis applies solely in the context of statutory claims. *Armendariz* did not adopt a blanket rule that every predispute arbitration clause is invalidated as unconscionable when an employee asserts without any evidence an inability to pursue a dispute which contains *no* statutory claims. (See *Brennan v. Tremco Inc., supra*, 25 Cal. 4th at p. 317 [*Armendariz* requirement that the arbitrator state reasons for the award in a FEHA case inapplicable when nonstatutory claims involved].)

4. Law to be Applied

Plaintiff argues that the following language renders the arbitration clause unenforceable: "Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis

other than such controlling law, including but not limited to, notions of 'just cause.'" Plaintiff analogizes the language to the limitation of remedies analysis in *Kinney v. United Healthcare Services, supra*, 70 Cal. App. 4th at p. 1332 and *Stirlen v. Supercuts, Inc., supra*, 51 Cal. App. 4th at pp. 1529-1530. In *Kinney*, the arbitration agreement limited theories of recovery for the employee so as to prevent the recovery of certain types of contract damages as well as other compensatory and punitive relief. (*Kinney v. United HealthCare Services, Inc., supra*, 70 Cal. App. 4th at p. 1332.) In *Stirlen*, the arbitration clause limited the employee's remedies as follows: "'The exclusive remedy for alleged violation of this Agreement . . . shall be a money award not to exceed the amount of actual damages for breach of contract, less any proper offset for mitigation of such damages, and the parties shall not be entitled to any other remedy at law or in equity, including but not limited to other money damages, exemplary damages, specific performance, and/or injunctive relief.'" (*Stirlen v. Supercuts, Inc., supra*, 51 Cal. App. 4th at p. 1529.) In *Armendariz*, the Supreme Court noted that an agreement which does not even permit full recovery of ordinary contract damages by the employee while placing no restriction on recoverable compensation if a claim is brought by an employer is impermissively one-sided. (*Armendariz v. Foundation Health Psychcare Services, Inc., supra*, 24 Cal. 4th at pp. 120-121.) No such limitations appear in the present agreement. It requires the arbitrator, a retired superior court judge, to follow the law.

Likewise without merit is plaintiff's contention that the contractual prohibition against using "just cause" principles in returning an award renders the agreement unconscionable. As noted previously, the arbitrator, a retired superior court

judge, must apply the following legal standard in returning an award, "Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis other than such controlling law, including but not limited to, notions of '*just cause*.'" (Italics added.) The concept of "just cause" appears repeatedly in cases construing collective bargaining agreements subject to the Labor Management Relations Act. (E.g. *United Paperworkers Intern. Union v. Misco, Inc.* (1987) 484 U.S. 29, 33, 39-40 [arbitrator could refuse to examine post termination evidence in making "just cause" determination under a collective bargaining agreement]; *Gulf Coast Industrial Workers Union v. Exxon Co.* (5th Cir. 1993) 991 F.2d 244, 255-256 ["just cause" for a termination under a collective bargaining agreement must be evaluated in terms of the facts known to the employer at the time of termination]; Hill & Westoff, *No Song Unsung, No Wine Untasted--Employee Addictions, Dependencies, And Post-Discharge Rehabilitation: Another Look At The Victim Defense In Labor Arbitration* (1999) 47 Drake L.J. 399, 413 ["'Just cause' is a term of art as employed in Collective Bargaining Agreements. Attendant upon that term are established concepts of industrial fairness and due process of both a substantive and procedural nature"]; Abrams & Nolan, *Toward A Theory Of 'Just Cause' In Employee Discipline Cases* (1985) Duke L.J. 594 ["Collective bargaining agreements typically provide for arbitration of disputes concerning the interpretation or application of the contract. As a result, arbitrators are routinely required to apply the just cause standard in order to evaluate the propriety of disciplinary action"].) The present dispute does not involve the construction of a collective bargaining agreement. Hence, prohibiting the use of principles of just cause in returning an arbitration award is not

unconscionable where no collective bargaining agreement is involved, the arbitrator, who must be a retired superior court judge, is to apply the applicable rules of law, and the employee retains all of her or his legal and equitable remedies.

[Part III.B.5. is deleted from publication]

5. Other Contentions

Plaintiff raises other contentions premised on the *Armendariz* analysis relating to arbitration of Fair Employment and Housing Act claims. (*Armendariz v. Foundation Health Psychcare Services, Inc., supra*, 24 Cal. 4th at pp. 99-111.) For the reasons previously expressed, the present cade does not involve a statutory claim and the *Armendariz* analysis is not controlling based on the evidentiary showing made to date because the present case does not involve a statutory claims. (*Brenna v. Tremco Inc., supra*, 25 Cal.4th at p. 317.) Also, there is nothing substantially unconscionable about the agreement which applies equally to each side and which allows judicial review.

IV. DISPOSITION

The order denying the motion to compel arbitration of defendant, Auto Stiegler, Inc., is reversed. The matter is remanded with directions to order arbitration. Defendant,

Auto Stiegler, Inc., is to recover its costs on appeal from plaintiff, Alexander M. Little.

TURNER, P.J.

We concur:

ARMSTRONG, J. WILLHITE, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 11/02/00

HONORABLE S. Patricia Spear Judge

HONORABLE Judge Pro Tem
Add On

T. Camacho Crt Asst Deputy Sheriff

Dept. 13

Sybil R. Hale Deputy Clerk

J. Streeter Reporter

9:00 am BC230809

ALEXANDER M LITTLE No Appearances
v.
AUTO STIEGLER INC

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER;

Superior Court of California Minute Order - 11/02/00

Having heard argument from both sides, the Court makes the following ruling:

Plaintiff's motion for reconsideration of the court's ruling on Defendant's motion to compel arbitration is granted in view of the Supreme Court opinion in the matter of Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83 (2000) issued after the court's prior ruling.

The court believes that the arbitration clause in issue does not meet the standards set forth by the Supreme Court and it should not be enforced. The clauses of the arbitration agreement that do not comport with the requirements of the Armendariz, include the clauses that:

1. Require the Plaintiff to share the costs;
2. Provide for no judicial review. The court deems this fatal, as judicial review of all decisions is not the same as limited review by another arbitrator of only certain awards;
3. Limit the remedies available to the complaintant possibly exclude equitable as opposed to legal remedies, to which he might otherwise be entitled.
4. Lack of mutuality of remedy, in that this clause, unlike the one in Armendariz does not obviously bind the employer to likewise enforce its right in the arbitration forum.

Based on the foregoing infirmities, the Defendant's motion to compel arbitration is denied and Defendant is ordered to answer the complaint in 20 days of the court's ruling in open court.

Superior Court of California Minute Order - 11/02/00

Initial Status Conference set for December 15, 2000 at 9:00 A.M. in this Department.

A copy of this minute order is sent via United States Mail to parties listed on the Certificate of Mailing.

Superior Court of California Minute Order - 11/02/00

CERTIFICATE OF MAILING

Superior Court Central

Civil Division

ALEXANDER M LITTLE

VS. BC230809

AUTO STIEGLER INC

Moskowitz, Brestoff, Winston & Blinderman
Attorney for Pltf/Petnr
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Attorney for Defendant/Respondent
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I am over the age of 18 years and not a party to the within action. I am familiar with the Los Angeles Superior Court practice for collection and processing of correspondence and know that such correspondence is deposited with postage prepaid with the United States Postal Service the same day it is delivered to the mail room in the Los Angeles Superior Court. I declare under penalty of perjury under the laws of the State of California that I delivered a true copy of the above notice to the party(ies) or his (their) attorney of record

as addressed and listed above by placing the copy in a sealed envelope to the mail room of this court.

APPENDIX D

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

NO. BC230809

ALEXANDER M. LITTLE,
PLAINTIFF AND RESPONDENT
v.

AUTO STIEGLER, INC., ET AL.,

DEFENDANTS AND APPELLANTS.

Appeal from the Superior Court
of Los Angeles County
Honorable S. Patricia Spear, Judge

REPORTER'S TRANSCRIPT ON APPEAL
8/7/00 AND 10/31/00

APPEARANCES:

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FOR DEFENDANTS:

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By: Christopher C. Hoffman, Esq.
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(949) 851-2424 Fax (949) 851-0152

Jon Streeter
Official Reporter
CSR No. 3704

The Court: Okay. On Little versus Auto Stiegler, is everybody here? I guess so.

Mr. Hoffman: Good Morning, Your Honor, Chris Hoffman for Defendant Auto Stiegler.

Mr. Winston: Dennis Winston on behalf of Plaintiff, Alex Little.

The Court: Good Morning. I did give you a tentative ruling. Did you see that?

Mr. Winston: No, Your Honor, I haven't seen it.

The Court: Okay. We'll put this on second call. It should be on the court attendant's desk. Why don't you take a look at that, and then when you're ready I'll recall it.

Mr. Hoffman: Thank You, Your Honor.

The Court: This isn't my regular court attendant, so she didn't know what to do with all the stuff.

Mr. Hoffman: Certainly.

The Court: We'll get organized.

(Whereupon a Recess Was Taken
From 8:42 a.m. to 8:49 a.m.)

The Court: Little versus Auto Stiegler.

Okay. We've already had the appearances of counsel for the record. And have you had a chance to review the tentative ruling?

Mr. Winston: Yes, Your Honor.

The Court: And the tentative ruling is to compel the arbitration of the state of proceedings. I think counsel probably has some comments for me.

Mr. Winston: I think I'm up, Your Honor. I think you're right.

Your Honor, I think we should start with the initial premise that it's clear this contract, this arbitration provision, wasn't negotiable, so it's procedurally unconscionable, and we start there, and then we just focus on whether it's substantively unconscionable.

The Court : Okay.

Mr. Winston: And the answer to that is, I think that -- I understand your tentative; however, let's focus just on the right of appeal. Yes, both sides have the right of appeal; however, if Little loses, he doesn't get to appeal.

The Court : Yes, he does.

Mr. Winston: No, he doesn't

The Court : It says both sides have the right to appeal.

Mr. Winston: No, if Little loses, he doesn't get to appeal.

The Court: Why?

Mr. Winston: Because it's in the agreement. It's only if there is an award over $50,000 that the losing party gets to appeal, so if Little loses, he loses. That's not fair.

Second, it's only if Little wins enough to make a difference to Auto Stiegler then they get to appeal. If it's a

little amount under $50,000, they don't care, they don't appeal.

The Court: But he can appeal.

Mr. Winston: No.

The Court: Wait, I'm looking at the third agreement that was signed in 1987 which clearly says both parties have the right to appeal. Why doesn't that mean both parties have the right to appeal? I don't understand that.

Mr. Winston: Okay, great. In Exhibit C it says awards exceeding $50,000 shall include the arbitrator's written reasoned opinion, and at either party's written request within 20 days after issuance of the award shall be subject to reversal and remand, modification, or reduction following review of the record, et cetera, by the appellate court. But, again, if Little doesn't get an award over $50,000, he doesn't get to appeal.

The Court: But is there any requirement that arbitration agreements have any right of appeal?

Mr. Winston: No, there isn't.

The Court: I mean in the law.

Mr. Winston: That's right. There isn't. That's the point. This agreement is unfair because --

The Court: Well, wait a minute. Don't most arbitration agreements not have a right to appeal, and aren't they still legal?

Mr. Winston: Absolutely.

The Court: So why is it unfair?

Mr. Winston: Because it only gives the right to appeal basically to Auto Stiegler if Little wins big.

The Court: What if Little wins 60,000 and he thinks the claim is worth 200, he wouldn't bother appealing or you just don't think the claim is worth 200?

Mr Winston: Well, Your Honor, as the Court said in the Saika case and in Beynon, let's get real. The odds of that happening are so slim that you have to look at the reality of the situation. The reality of the situation is the appellate provision benefits only Auto Stiegler because only Auto Stiegler's going to care. That's exactly what the Saika case was about, and that's exactly what happens in Beynon.

In Saika, for example, both sides could appeal that too, but they could appeal awards over $25,000, and that's when the court says get real, come on, the odds of--

The Court: That was for a trial de novo.

Mr. Winston: No.

The Court: Yes, it was.

Mr. Winston: Well, Saika is de novo, but Beynon is just a second arbitrator. Beynon -- that's also in our brief.

The Court: Uh-huh.

Mr. Winston: If you would like the citation --

The Court: Why is the -- Okay. All right.

Mr. Winston: Okay. So that's why the appeals procedure's unfair because it really only benefits Auto Stiegler because, again, the only time there's really an appeal is if there's a big award.

The Court: Okay.

Mr. Winston: Whatever that is, and that's exactly what they're talking about in the Beynon and Saika cases.

The Court: Okay.

Mr. Winston: And the answer to that then is throw out the appellate provision. You're right; normally arbitration provisions wouldn't have any appeal at all. That's okay. Have no appeal for either side, and that's in fact what the resolution was in the Saika case and the Beynon case. They simply said throw out the appellate provision. So that's fine. If neither side can appeal, and it's just a big award, and that's the way it goes, that's a fair provision, but that's not the way it's written now.

The second thing, Your Honor, in terms of what Little can appeal to, he can't use equity. That's what the arbitrators can't use. They must follow the law, whatever "the law" means, but they can't rely on any equitable principles, for example, motions of quote-unquote just cause. That's in the agreement as well. Well, apparently that means that Little can't assert an unclean-hands argument against them to estop them from taking positions, he can't use any equitable position, and that' s not fair either.

Again, when you go back to the Stirlen case, for example, or -- and you want to talk about things that are available normally in an arbitration provision -- or an arbitration proceeding that are denied, types of relief, for example, that makes it unfair.

Next, Your Honor, although we talk about this mutuality, remember, Little gives up any claim to a jury trial for any claim he's got against Stiegler, Sr., in other words,

the directors or officers, but they don't give up anything. Stiegler, Sr., is not a party to this contract. Stiegler, Jr., is not a party to this contract, but the arbitration provision requires little to give up his rights against the directors and officers. Again, it' s a one-sided agreement.

The Court: Well, he only names the company.

Mr. Winston: He does, but events that could happen -- in other words, events could arise that might give a claim by Stiegler, Jr., or Stiegler, Sr., against him.

The Court : All right, but you plead them, and you don't name them.

Mr. Winston: That's correct. I'm talking about the reverse situation: Stiegler, Jr., or Stiegler, Sr., could sue him. They're not required to submit their claims to arbitration. And yet Little would have to arbitrate if he were going against them because he's given up that right against all directors and officers of the company, but they don't give up the right as to him.

The Court: Uh-huh.

Mr. Winston: So we have an unconscionable -- substantively unconscionable, provision because it is so weighted toward the company that Alex Little doesn't have the opportunity to assert equity; he doesn't have the right of appeal if he loses. That's a one-sided provision. And because it infects the entire provision, you can't keep crossing things out of the arbitration agreement to make it legitimate. It infects all of it.

What you'd be doing now, Your Honor, is you'd be saying, okay, cut out the right of appeal for both sides, and

this does not apply to the directors and officers. You've already talked about the fees, that they have to pay the fees. You keep on cutting things out --

The Court: Well, there's no provision for fees in the agreement, so --

Mr. Winston: That's right, and as you pointed out, Your Honor, as the Cole case says, the statutory provision for sharing fees is simply a default provision. It's if there's no other considerations involved. But under Cole and the Federal Arbitration Act, you can't have the employee required for the fees. And so that's absolutely right, Your Honor. But, again, what we're doing is you keep on cutting out provisions --

The Court: But there' s no provision that's cut out, it's just that --

Mr. Winston: You're interpreting the agreement in away to require that the company pays.

The Court: Well, that's what I'm required to do, isn't it?

Mr. Winston: Yes, Your Honor, I Think that's right, under Cole.

The Court: All right. What else?

Mr. Winston: I'll stop there for a moment, Your Honor.

The Court: Okay. Let Me Hear from Defense Counsel, Mr. Hoffman.

Mr. Hoffman Thank you, Your Honor. I Will Briefly Respond.

And with all due respect to counsel, I think there are some red herrings being thrown out here. First of all, I do not believe that this agreement is procedurally unconscionable. Plaintiff was given several opportunities to read advance copies of the arbitration agreements. He acknowledged it in his declaration. At both times he applied, one of which was over a year before he was actually hired, the arbitration provision was present there. On the day he started working, he signed the third copy, which is Exhibit C which we're referring to. In bold and all caps at the bottom is "PLEASE DO NOT SIGN WITHOUT READING. ASK IF YOU HAVE ANY QUESTIONS." He did not avail himself of those opportunities.

Secondly, the whole premise of the unenforceable procedurally is based upon the assumption that it's a contract of adhesion. And I would dispute that it's a contract of adhesion for several reasons. One, we just discussed, the fact that he had an opportunity to review it in advance and didn't avail himself of an opportunity to negotiate. It's very easy to say in hindsight, Oh, I could have negotiated, but he never made an effort. Virtually every contract is initially drafted by one party, and if it's going to be negotiated, the other party has to say, wait a minute, I don't like this term. That never occurred.

Second, under the Federal Arbitration Act preemption issue, you cannot look at this as a contract of adhesion. Binding California law, as well as federal case law states that when you're looking at these agreements that are under -- within the F.A.A., you cannot use state contract of adhesion principles to determine its enforceability. So before we can get to the substantive elements, I don't think it's anywhere near a procedurally unconscionable agreement.

Second, when we get to the substantive issues, Your Honor was, I think, making a couple of the points I would make in reference to the appeal provision. First of all, it is bilateral. Both sides have the right to appeal, and it's very convenient again to look back at this and say that, well, that meant that Mr. Little was being railroaded here. Well, at the time the agreement was signed when it was started, it's just as possible that Auto Stiegler would be filing suit against Mr. Little for breach of trade secrets, for violating confidentiality, for intentional interference with business prospects. All of these were possible causes of action which the company was saying will be resolved through binding arbitration.

Second of all, if an award is a $51,000 or fifty thousand and one dollars, and Mr. Little believes that is a multi-million-dollar claim, he has the right to appeal that. It's not just Auto Stiegler. It's both parties.

Second, in reference to the equity argument, I keep hearing from plaintiff's counsel, and it's also in his brief, he seems to be saying that it's an unenforceable provision to require the arbitrator to follow the law. That's all the agreement says is the arbitrator must follow the stated substantive law of California. And if the substantive law of California allows for equitable remedies, those are available.

Just cause is referencing more a traditional labor-type arbitration where arbitrators take a more this isn't what the law says, but I feel there is just cause to impose this remedy where it's not following strictly the law.

The Court: So you feel this agreement allows an arbitrator to look at equitable defenses?

Mr. Hoffman: If it is part of the law governing the claims pled, absolutely, absolutely. That' s what it's limiting the Judge to do or the retired superior court Judge as the arbitrator to do is to apply the law. And whatever remedies are available under the laws if the person were walking into court are available in the arbitration. This is not an agreement such that it was invalidated in Stirlen where they're taking away rights of appeal, remedies, attorneys' fees as in Kinney where they're imposing -- or limiting the right to discovery and what would end up making an unfair proceeding. Essentially, this is just a forum shift, and that's exactly what the California Supreme Court was referencing in the Magee Case v Kaiser Case where it's talking about these are not unenforceable provisions because they're simply changing venues, we're not changing substantive rights; we're changing venues.

I guess the last thing -- I'll give counsel an opportunity to respond -- is in reference to the parties that somehow because the arbitration agreement allows or requires Mr. Little to arbitrate claims against the officers and directors, there's key words missing there. It requires him to arbitrate claims against officers and directors of my client if they are arising out of the course and scope of his employment. And as we know, what that's there for is because the employer is liable, indemnifies officers and directors for conduct arising out -- outside of -- within the course and scope of their employment. And so it is simply saying that you can't do an end run and sue the company by suing the individual officers. It's all going to be present in one dispute.

Hence the concern that that doesn't require the officers and directors to arbitrate with Mr. Little. Well, if it's arising

outside -- outside of the course and scope of his employment, Mr. Little similarly would not have to arbitrate those claims against the officers and directors. It's only for claims arising within the course and scope of his employment.

The Court: Okay.

Mr. Winston: I'll be very brief, Your Honor.

The Court: Sure.

Mr. Winston: In terms of procedural unconscionability, the issue isn't whether Little read the agreement, it's whether he could have negotiated. It was presented him -- presented to him on a take-it-or-leave-it basis. And you notice Auto Stiegler's business officer, Linda Lyons, in her declaration at paragraph 4 says: "I have been available and willing to explain this agreement upon the request of any applicant or employee." Doesn't say she had the authority to negotiate it. Doesn't say she had the authority to change any of its terms. That's not negotiation. She's just saying I'll tell you what it means, not that I'll negotiate. So it was procedurally unconscionable.

And in terms of appeal, come back, come back. The issue is if Alex Little loses the arbitration, he cannot appeal. Whereas if Auto Stiegler loses the arbitration in an amount big enough to matter to them, in other words, fifty thousand and one dollars, then they get to appeal. That is a one-sided provision.

Finally, Counsel still won't address the fact that Alex Little has to give up his rights to sue the directors, but the directors don't give up their rights to sue him. It is a one-sided provision. And the Federal Arbitration Act permits states to apply state substantive law. That's obvious in the

doctor's case, the U.S. Supreme Court case, and the California Supreme Court case, Broughten, so we don't have a problem there in terms of applying state substantive contract law. That' s section 2 of the Federal Arbitration Act. So that's not the problem. The problem is whether this agreement is so one-sided that it simply should not be enforced. That's the issue.

The Court: Okay. All right. Well, I did read the many of the cases you cited to me especially the cases that invalidated those types of agreements in California and compared the language of the arbitration agreement in this case with the language of the agreement they invalidate. It's a very substantial difference. And in fact the basis for invalidating them were those differences which don't appear in this arbitration agreement. There were very -- I can't remember -- I just read it yesterday, but there are very specific provisions that really stripped the employee of a lot of rights, or the patient, the medical one, of rights, and this really preserves everything.

Of course, California law, I think that, as I said, I'm required to interpret things under the law and to try to preserve them if I can. And I think really it does appear valid. I think that -- I really think I do need to grant the motion to stay the proceedings. However, I'm going to adopt my tentative ruling as my ruling but add to the bottom of the second paragraph where it says plaintiff is not precluded from seeking damages prayed for in the complaint, more for asserting equitable defenses recognized under California law to make sure that that's also clear, okay?

Mr. Winston: Thank You, Your Honor.

The Court: All right.

Mr. Hoffman: Thank You, Your Honor.

The Court: Okay. So that means you can still seek punitive damages, you can still assert equitable defenses. I think this really is a forum-shifting kind of arbitration agreement. It seems to be relatively -- actually very fair. Not as fair as a jury, I know, but fair enough.

Mr. Winston: Thank You, Your Honor.

The Court: Okay.

Mr. Hoffman: Thank You.

The Court: So the motion will be granted. The proceedings will be stayed. And with the civil court's active list, I will set a further active review hearing to see whether you've gotten your award and whether it's been confirmed in six months, so that would be 2/5 of 2001 at 9:00 a.m. In this department, and you can either have notice or notice will be waived.

Mr. Hoffman: Waive Notice, Your Honor.

Mr. Winston: I'll Waive Notice, Your Honor.

The Court : Okay. And I will have this tentative ruling typed into the minutes.

Mr. Winston: Thank You, Your Honor.

Mr. Hoffman: Thank You, Your Honor.

The Court: Okay. Thank You Very Much. Good Luck to you.

Mr. Hoffman: Thank You.

Mr. Winston: Okay.

(Whereupon at, 9:07 a.m., Proceedings
in the Within Matter Were Concluded.)

APPENDIX E

Auto STIEGLER, INC.

APPLICANT'S AGENT AND STATEMENT

I agree that any claim, dispute, or controversy (including, but not limited to, any and all claims of discrimination and harassment) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, and officers, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with, the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. Sec 1280 et seq., including section 1283.05 and all of the act's other mandatory and permissive rights to discovery); provided, however, that: In addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification On the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. Resolution of

the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis other than such controlling law, including but not limited to, notions of "just cause". As reasonably required to allow full use and benefit of this agreement's modifications to the act's procedures, the arbitrator shall extend the times set by the act for the giving of notices and setting of hearings. Awards exceeding $50,000.00 shall include the arbitrator's written reasoned opinion and, at either party's written request within 20 days after issuance of the award, shall be subject to reversal and remand, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial. I understand by agreeing to this binding arbitration provision, both I and the Company give up our rights to trial by jury.

If you have any questions regarding this statement, please ask a Company representative before signing.

I hereby acknowledge that I have read the above statements and understand the same.

DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE STATEMENT & AGREEMENT.

/s/_____ 01/13/97

Signature of Applicant Date

ALEX LITTLE

Applicant's Name (Please Print)

APPENDIX F

Portions of State Court Record
Where Preemption Argument Raised

Court of Appeals, Second Appellate District,
Division Five - No. B 147003
No. S101435

IN THE SUPREME COURT OF CALIFORNIA

ALEXANDER M. LITTLE,	)
Plaintiff and Petitioner,	)
v.	)
AUTO STIEGLER, INCORPORATED,	)
Defendant and Appellant.	)
	)

APPELLANT'S REPLY TO
PETITIONER'S SUPPLEMENTAL BRIEF

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Portions of State Court Record
Where Preemption Argument Raised

If this Court determines that a provision within the arbitration agreement is unconscionable, that provision should be modified or stricken, and the remainder of the agreement enforced according to its terms.

I. THE FEDERAL ARBITRATION ACT PREEMPTS THE UNIQUE RULE OF CONTRACT INTERPRETATION LITTLE URGES THIS COURT TO ADOPT

Understandably, Little fails to address the preemptive effect of the FAA on any rule of contract interpretation that does not apply to contracts in general. No matter how you examine it, a rule of law that would invalidate an arbitration agreement due to a single clause inserted in bad faith would derive from considerations unique to the peculiar nature of arbitration agreements, and, under the FAA, be inappropriate. *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 121 S.Ct. 1302; *Southland Corporation v. Keating* (1984) 465 U.S. 1, 104 S. Ct. 852; *Perry v. Thomas* (1987) 482 U.S. 483, 107 S. Ct. 2520; *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 116 S. Ct 1652.

II. EVEN ABSENT FAA PREEMPTION, THE POLICY CONSIDERATIONS APPLICABLE TO COVENANTS NOT TO COMPETE SHOULD NOT BE EXTENDED TO ARBITRATION AGREEMENTS

The public policy rationale that has served as the foundation for the invalidation of covenants not to compete do not appear within the context of an arbitration agreement. As previously argued to this Court, it is the stakes

Portions of State Court Record
Where Preemption Argument Raised

Court of Appeal, Second Appellate District,
Division Five - No. B 147003
S101435

IN THE SUPREME COURT OF CALIFORNIA

ALEXANDER M. LITTLE,	)
Plaintiff and Respondent,	)
v.	)
AUTO STIEGLER, INCORPORATED,	)
Defendant and Appellant.	)
	)

ANSWER BRIEF ON THE MERITS

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Court extend its holding in *Armendariz* to all claims of wrongful demotion or termination that are alleged to involve a fundamental public policy. However, without the presence of statutory claims, such a rule would render portions of the California Arbitration Act meaningless. Plaintiff's request also confuses, or perhaps simply equates, the well accepted exception to the doctrine of at-will employment for a violation of a fundamental public policy with unwaiveable statutory rights created by the Legislature. As noted by the D.C. Circuit Court of Appeals in *Brown v. Wheat First Sec.* (D.C. Cir. 2001) 257 F.3d 821,825, in rejecting a virtually identical request to extend the *Cole v. Burns* fee shifting requirement, "our central rationale -- Congressional intent does not extend beyond the statutory context."

1. Equating Claims for Violation of a Fundamental Public Policy to Explicit Statutory Rights is Erroneous, and Could Violate the Federal Arbitration Act

Plaintiff and Defendant do agree on one issue - California law recognizes that claims of wrongful termination in violation of fundamental public polices create an exception to the general presumption that employment is on an at-will basis. However, a significant difference exists between that proposition and Plaintiff's argument that public policy claims should be [11] elevated to equal the unwaiveable statutory fights specifically created by the Legislature.

Even where the fundamental public policy exception to the at-will doctrine applies, it only acts to preclude an employer's assertion that a wrongful termination claim is barred as a matter of law. *Gantt v. Sentry Insurance* (1992) 1 Cal. 4th

1083. The exception does not act to confer upon the employee any additional rights, such as those provided for in the FEHA, it simply allows the claim to proceed.

Indeed, if Plaintiff's theory controlled, virtually any employment claim could fall within its shadow. In *Brown v. Wheat First Securities*, the D.C. Circuit Court of Appeals rejected the exact argument proffered by Plaintiff. In its decision, the court discussed the difference between the recognized "public policy" exception to the at-will doctrine and statutory claims that evidence specific congressional intent. In doing so, the court clearly separated statutory claims from those based on the more amorphous theory of public policy, and rejected the plaintiff's attempt to interchange the term "statutory rights" with "public" policy based claims. *Brown* at 825.

The *Brown* court also cautioned that the requested extension of *Cole* could impose a serious limitation on arbitration agreements in violation of the [12] FAA by creating a state law limitation on the enforcement of arbitration agreements.

It concluded:

> "In short, the proposed extension of *Cole* would significantly alter the terms of the Federal Arbitration Act, imposing a serious procedural limit on a wide (but unpredictable) range of arbitration claims, all without the slightest signal from Congress."

Id. at 826.

2. Plaintiff's Claims do not Implicate a Fundamental Public Policy that is Closely Tethered to a Delineated Constitutional or Statutory Provision

Even if the *Armendariz* minimum requirements standard were extended to include non-statutory claims, Plaintiff's Complaint does not implicate a fundamental public policy arising from a constitutional or statutory provision. Rather, the alleged public policy at issue, "warranty fraud," only implicates a private contractual relationship between Defendant and the automobile manufacturer, Mercedes Benz.

As part and parcel of their relationship with the Mercedes Benz factory, Defendant agrees to perform service work on Mercedes vehicles that have problems covered by the warranty Mercedes provides to consumers upon the purchase of a vehicle. Plaintiff alleges that he complained that some warranty repairs charged to the factory should have been billed to the consumer.

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Portions of State Court Record
Where Preemption Argument Raised

Supreme Court Case No. S101435

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ALEXANDER M. LITTLE,	)
Petitioner,	)
vs.	)
	)
AUTO STIEGLER, INC.,	)
Respondent.	)
	)

RESPONDENT AUTO STIEGLER, INC.'S
ANSWER TO PETITION FOR REVIEW

Re: Decision of the Court of Appeal, Second Appellate District, Division Five, filed September 17, 2001 (Court of Appeal No. B147003) Los Angeles Superior Court Civil Case No. BC230809

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be extended to non-statutory state law claims. It's conclusion: "We also see no basis for extending *Cole*. As we have explained, our central rationale respecting congressional intent does not extend beyond the statutory context." *Id.* at 825 - 826.

While Little characterizes his Petition as a request that this Court take the "tiny step" of extending *Armendariz*, the reality of such an action by this Court would be monumental. The *Brown* decision went to considerable lengths to dispel the exact same myth in its decision. In rejecting Brown's request to extend the *Cole* rationale to whistleblower and other "public policy" based claims, the court stated: "Brown repeatedly urges that the D.C. Court of Appeals explicitly grounded its whistleblower exception [in *Cole*] in a "public policy" rationale. If this criterion controls, it is hard to see what falls outside it." *Id.* at 826.

As in *Brown*, the issue before the Court of Appeals was not whether Little has stated a claim for a violation of public policy that falls within the established exception to the general rule of at-will employment, but whether the *Armendariz-Cole* rationale for allocating the costs of arbitration should be extended to all mandatory arbitrations arising out of the employment relationship. In addition to the very real possibility of the exception swallowing the rule established by the California Arbitration Act, such a result would also, "significantly alter the terms of the Federal Arbitration Act, imposing a serious procedural limit on a wide (but unpredictable) range of arbitration claims, all without the slightest signal from Congress." *Brown* at 826.

Portions of State Court Record
Where Preemption Argument Raised

Appeal Case No. B147003

COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT - DIVISION 5

AUTO STIEGLER, INC.,	)
Appellant,	)
vs.	)
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,	)
Respondent,	)
ALEXANDER LITTLE,	)
Real Party in Interest.	)

Appeal from the Superior Court of Los Angeles
Civil Case No. BC230809
Judge S. Patricia Spear

APPELLANT AUTO STIEGLER, INC.'S OPENING BRIEF

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[1]

A. California Endorses Arbitration as a Fair and Expeditious Way to Resolve Employment Dispute.

The California Legislature and the California courts consistently have viewed arbitration as a viable and equitable means of resolving disputes, including employment disputes. Cal. Civ. Proc. Code § 1281.2; *Brookwood v. Bank of America* (1996) 45 Cal. App.4th 1667, 1676 (affirming lower court's order granting motion to compel arbitration in employment dispute); *Pacific Inv. Co. v. Townsend* (1976), 58 Cal. App.3d 1, 129 (holding that courts should indulge every intent to give effect to arbitration).

In fact, California has recognized arbitration as a preferred forum for resolution of parties' disputes, even where there is some doubt about the obligation to arbitrate: "[d]oubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration." *United Transp. v. Southern Cal. Rapid Transit Dist.* (1992), 7 Cal. App.4th 804, 808; *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993), 15 Cal. App. 4th 119 (holding resolution of disputes by arbitration is strongly favored and doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration).

B. The Federal Arbitration Act Requires Arbitration Of Little's Claims.

Little's claims arealso subject to arbitration pursuant to the Federal Arbitration Act ("FAA") 9 U.S.C. §§ 1-4. Specifically, the subject arbitration agreement provides in pertinent part: "I agree that any claim... shall be submitted to and determined exclusively by binding arbitration under the **Federal Arbitration Act**...." (*emphasis added*). (CT at 35). The FAA provides in pertinent part: "[a] written provision in any . . . contract [6] evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The United States Supreme Court recently made it clear that pre-dispute employment arbitration agreements are valid and enforceable under the FAA. *Circuit City Stores, Inc. v. Saint Clair Adams* (2001), 121 S. Ct. 1302, 1305. Further, in *Circuit City,* the court acknowledged the impact and applicability of its previous decision in *Southland Corp. v. Keating* (1984) 104 S. Ct. 852, which had reversed a California Supreme Court decision that nullified an arbitration agreement. As the Supreme Court stated in *Southland Corp. v. Keating,* a state may not place any limitations on the enforcement of arbitration agreements that are not placed upon contracts in general, *Id.* at 857. To allow otherwise would create litigation, and as here, nullify one of the primary benefits to the arbitration process.

In *Gilmer v. Interstate/Johnson Lane* (1991), 500 U.S. 20, the United States Supreme Court held that an agreement to arbitrate all employment-related disputes arising between an

employee and his employer mandated arbitration of the employee's age discrimination claim. In so holding, the Supreme Court recognized arbitration as a legitimate method of resolving disputes between employers and employees. The Court rejected the "view that arbitration was inferior to the judicial process for resolving statutory claims." *Id.* at 34 n.5; (CT at 66).

Finally, in *Golenia v. Bob Baker Toyota* (1996), 915 F.Supp. 201 (S.D. Cal.), an arbitration agreement virtually identical to the ones signed by Little in the instant case was enforced by a federal court in San Diego. The *Golenia* [7] decision not only confirmed that the FAA applies to automobile dealerships like Auto Stiegler, but that arbitration merely "substitutes one forum for another, and not necessarily an inferior forum." *Id.*

Little executed valid, enforceable contracts to arbitrate all disputes arising out of his employment with Auto Stiegler. Little's claims herein arise out of his employment. Consequently, there is no question that the instant action falls within the parameters of the subject arbitration agreement. Pursuant to the mandates set forth in 9 U.S.C. § 2, and as reaffirmed in *Circuit City*, *Gilmer*, and *Golenia*, this Court must honor the agreement under the FAA.

II. PURSUANT TO *ARMENDARIZ*, A PRE-DISPUTE ARBITRATION AGREEMENT THAT IS SILENT AS TO COST APPORTIONMENT AMONGST THE PARTIES IS ENFORCEABLE.

One of the reasons noted by the lower court for not enforcing the arbitration agreement was because it required Little to share in the costs. The California Supreme Court

specifically held in *Armendariz* that a pre-dispute arbitration agreement will not be unenforceable where it is silent on the issue of the apportionment of arbitration costs. The Court stated in pertinent part: "[t]he absence of specific provisions on arbitration costs would therefore not be grounds for denying the enforcement of an arbitration agreement." *Armendariz,* 24 Cal. 4th at 113. Yet the lower court relied on this very aspect of the arbitration agreement involved here in directing that enforcement of the agreement be denied.

The lower court ignored the direction provided by the Court in *Armendariz:* where the arbitration agreement is silent as to costs or alternatively (as in *Armendariz* and in this case) incorporates the California

[8]

Portions of State Court Record
Where Preemption Argument Raised

SUPERIOR COURT FOR THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES, CENTRAL DISTRICT

CASE NO. BC230809

[Filed October 25, 2000]

ALEXANDER M. LITTLE,	)
Plaintiff,	)
vs.	)
AUTO STIEGLER, INC. and	)
DOES 1 through 10, inclusive,	)
Defendants.	)
	)

OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER ORDER COMPELLING ARBITRATION

I. INTRODUCTION.

Agreements to arbitrate are favored in the law, and should be enforced. Plaintiff's Motion to Reconsider is little but a rewrite of his previous arguments, cast in the guise of a Motion for Reconsideration. The Plaintiff has failed to establish legal grounds for relief under C.C.P. Section 1008. Notably, Plaintiff's Motion to Reconsider does not dispute that prior to commencing his employment, Plaintiff signed a contract agreeing that any controversy arising out of or relating to his employment would be resolved by binding

arbitration. This is such a case. Nor does this repackaged argument allege that Plaintiff did not read or comprehend the terms of the agreements he signed. He even acknowledges the overriding public policy in favor of enforcing arbitration agreements. Yet,

[1]

V. THE STATE LAW CONTRACT OF ADHESION PRINCIPLE RELIED ON BY PLAINTIFF IN HIS ATTEMPT TO DEMONSTRATE UNCONSCIONABILITY ARE PREEMPTED BY THE FEDERAL ARBITRATION ACT.

Plaintiffs claim that the instant arbitration agreements is unconscionable ignores binding authority which holds that when, as here, an arbitration agreement falls under the purview of the Federal Arbitration Act, state law principles of determining the enforceability of adhesion contracts do not apply. Erickson v. Aetna Health Plans of California (1999.) 71 Cal.App.4th 646. In Erickson, the lower court refused to enforce an arbitration agreement. In reversing the lower court, the Court of Appeals discussed the limitations imposed by the FAA on attempts to circumvent a signed arbitration agreement. The Court of Appeals specifically rejected the argument that the agreement should be analyzed as a contract of adhesion stating "it has been repeatedly stated that '... state adhesion contract principles are inapplicable to the enforcement of arbitration clauses in an agreement governed by the Federal Arbitration Act...'." Id. at quoting Chan v. Drexel Burnham Lambert, Inc., (1986) 178 Cal.App.3d 632, 637.

VI. PLAINTIFF'S ARGUMENT THAT THE AGREEMENT AS A WHOLE IS UNENFORCEABLE IS CONTRARY TO CALIFORNIA PUBLIC POLICY SET FORTH IN *ARMENDARIZ* AND PRIOR SUPPORTING CASE LAW.

Plaintiff argues that because the agreement is riddled with unfair provisions, it is enforceable in its entirety. For reasons set forth above, this argument fails. These arguments also presuppose that any defect in the agreement cannot be cured by simply striking the offending provisions. Although the Court need not do so in this case, it certainly could do so if necessary. Therefore, Plaintiff's reliance on Armendariz and Saika v. Gold, (1996) 49 Cal.App.4th 1074, which authorize the Court to do just that, is misplaced. Contrary to Plaintiff's argument, there is absolutely nothing in Armendariz which requires the Court to reconsider its ruling or strike any provision of the agreement which Plaintiff signed and now wants to ignore for self-serving reasons. Indeed, the agreement in this case has none of the infirmities of the cases which Plaintiff cites in this Motion, or at any time. If any case warranted enforcement of an arbitration agreement as drafted, this is the case.

[8]

Portions of State Court Record
Where Preemption Argument Raised

SUPERIOR COURT FOR THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES, CENTRAL DISTRICT

CASE NO. BC230809

[Filed October 25, 2000]

ALEXANDER M. LITTLE,	)
Plaintiff,	)
vs.	)
AUTO STIEGLER, INC. and	)
DOES 1 through 10, inclusive,	)
Defendants.	)
	)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ARBITRATION

I. INTRODUCTION.

In this action, Plaintiff Alexander Little alleges four causes of action arising out of his employment with Defendant Auto Stiegler, Inc. Plaintiffs' Complaint alleges that Mr. Little was subjected to tortious demotion and termination, as well as breach of contract, by the Defendant. In essence, Mr. Little alleges that as a result of his complaining about possible warranty fraud being committed by his subordinates, he was targeted by the owners for demotion and eventual termination.

Prior to commencing his employment, and twice during his employment, Plaintiff Alexander Little signed contractual agreements that any controversy arising out of or relating to his employment would be resolved by binding arbitration. Even a cursory analysis of Plaintiff's Complaint reveals that

[1]

534.

b. <u>The Arbitration Agreement Executed By Plaintiff Specifically Contemplates Arbitration of All Claims, Including Those Based On Harassment</u>

Plaintiff has agreed to arbitrate all disputes with his employer, including any claims arising from his employment relationship. Plaintiff should not now be allowed to escape the effect of the Arbitration Agreement he signed simply because he believes a civil action would be a more desirable means of vindicating his rights. Thus, this dispute should be ordered to arbitration in accordance with the parties' agreement.

IV. <u>THE FEDERAL ARBITRATION ACT REQUIRES ARBITRATION OF PLAINTIFF'S CLAIMS</u>

Plaintiffs' claims are also subject to arbitration pursuant to the Federal Arbitration Act ("FAA") (9 U.S.C. §§ 1-4). The FAA provides: "A written provision in any... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract... shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The present case is governed by the FAA. The FAA applies to any written contract "involving commerce." It has long and consistently been held that automobile dealerships, such as Auto Stiegler, involve intestate commerce even when their sales are conducted only within the state. See, e.g., Cartrade, Inc. v. Ford Dealers Advertising Assoc. (9th Cir. 1971) 446 F.2d 289, 292; National Labor Relations Board v. Howell Chevrolet Co. (9th Cir. 1953) 204.F.2d 79, 81. In fact, recently, a federal court in San Diego expressly held that the FAA applies to an arbitration agreement between an automobile dealership and its employee containing virtually the exact language contained in the agreements at issue here. Golenia v. Bob Baker Toyota (S.D. Cal. 1996) 915 F. Supp. 201.

The U.S. Supreme Court and the California Courts of Appeal all have enforced arbitration agreements in employment discrimination cases pursuant to the FAA. The U.S. Supreme Court, in Gilmer v. Interstate/Johnson Lane (1991) 500 U.S. 20, held that an agreement to arbitrate all employment-related disputes arising between an employee and his employer mandated arbitration of [5] the employee's age discrimination claim. In so holding, the Supreme Court recognized arbitration as a legitimate method of resolving employment disputes -- even disputes involving claimed violations of statutory rights. The Court rejected the "view that arbitration was inferior to the judicial process for resolving statutory claims." Id. at 34 n.5.

Similarly, the California Court of Appeal followed Gilmer and enforced an arbitration agreement pursuant to the FAA in a race discrimination case brought under California's employment discrimination laws In Spellman v. Securities,

Annuities & Ins. Services, Inc. (1992) 8 Cal.App.4th 452, 10 Cal.Rptr.2d 427, the court held that statutory discrimination claims are subject to mandatory arbitration where the parties have executed an arbitration agreement covering employment related disputes. The court also held that the FAA is applicable to actions brought under California state law involving employment practices, declaring: "[R]eliance on a state statutory anti-discrimination scheme, as here, rather than on a federal title VII claim, does not alter the analysis of enforceability of arbitration agreements under the FAA." Id. at 462.

In Golenia v. Bob Baker Toyota, supra, an arbitration provision virtually identical to the ones signed by Plaintiff in the instant case was enforced. The Golenia court held that arbitration merely "substitutes one forum for another, and not necessarily an inferior forum." Id. Thus, even if state law principles of contract law were to be applied, the arbitration agreement which Plaintiff Alexander Little herein signed must be enforced.

Plaintiff Alexander Little here executed valid, enforceable contracts to arbitrate all disputes arising out of his employment at Auto Stiegler. All of Plaintiffs' claims herein arise out of his employment at Auto Stiegler. Consequently, there can be no dispute that the instant action falls within the parameters of the subject arbitration agreement. Pursuant to the mandates set forth in 9 U.S.C. § 2, and as reaffirmed in Gilmer, Spellman, and Golenia, this Court must require Plaintiffs to arbitrate all of their claims against Mr. Little's employer, Auto Stiegler.

V. PLAINTIFFS' ACTION SHOULD BE STAYED PENDING COMPLETION OF BINDING ARBITRATION

Defendants also petition the Court for an order staying this action pending completion of

[6]

Supreme Court, U.S.
FILED
AUG 27 2003
OFFICE OF THE CLERK

No. 02-1720

IN THE

Supreme Court of the United States

AUTO STIEGLER, INC.,

Petitioner,

v.

ALEXANDER M. LITTLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

This case does not present the Court with the opportunity properly to address the issue Petitioner Auto Stiegler, Inc. ("Auto Stiegler") frames. Auto Stiegler posits the issue as whether the Federal Arbitration Act [1] ("FAA") preempts the California Supreme Court's "blanket" rule that all employers must always pay all arbitration forum costs in matters involving state law claims of wrongful termination in violation of public policy. The issue thus framed is not consonant with the facts or the law applicable to (or announced by) the California Supreme Court's decision in *Little v. Auto Stiegler, Inc.* ("*Little*").[2]

The first problem with Auto Stiegler's formulation is that the FAA does not provide for any particular allocation of the costs unique to arbitration; and, the parties' arbitration agreement here was silent as to the allocation of such costs to arbitrate Respondent Alexander M. Little's ("Little") state law claims. As a result, the parties and California's courts properly applied state law to determine how such costs were to be allocated. The California Supreme Court then applied state law, applicable to all contracts, and held that imposing the costs unique to arbitration upon an employee litigating claims "unwaivable" under state law—pursuant to an adhesive contract—would be unconscionable. *Little* does not represent a refusal to enforce the parties' arbitration agreement, as written, nor an impediment to its enforcement; hence, it does not contradict (nor is preempted by) any provision of the FAA.

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1. 9 U.S.C. §§ 1 through 16.

2. 29 Cal.4th 1064, 63 P.3d 979, 130 Cal.Rptr.2d 892 (2003).

Second, the California Supreme Court's decision in *Little* is not inconsistent with this Court's decision in *Green Tree Financial Corp. v. Randolph*.[3] In *Green Tree*, this Court held that silence in an arbitration agreement as to how costs would be allocated for the arbitration of federal statutory claims "does not render the agreement unenforceable."[4] Before such an arbitration agreement can be invalidated *in toto* over the allocation of costs, the Court required a case-by-case fact specific analysis.

In *Little*, California agreed with *Green Tree* that silence on the allocation of fees does not render an arbitration agreement unenforceable. The court in *Little enforced* the parties' agreement, ordering them to arbitrate their dispute, by interpreting the agreement under state law so as not to include an unconscionable clause. In that context, *Green Tree's* case-by-case formulation is not required; it simply does not apply.

This Court should deny the Petition because the question of who should pay for the arbitration of state law claims involving "unwaivable rights" under state law is properly a question of state law. The California Supreme Court *enforced* the arbitration agreement here, to the extent of the parties' actual agreement, and applied the same state law to the agreement as applies to any contract in California.[5]

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3. 531 U.S. 79 (2000).

4. *Green Tree*, 531 U.S. at 82.

5. Contrary to the argument of *Amicus curiae* Employers Group in support of Auto Stiegler's Petition, as to the issues actually decided in *Little*, there is no split to resolve among the California and federal courts as to the enforcement of contractual clauses that are unconscionable under applicable state law.

I.

THE CALIFORNIA SUPREME COURT'S DECISION IN *LITTLE* IS NEITHER PREEMPTED BY THE FAA NOR INTERFERES WITH THE ENFORCEMENT OF ARBITRATION AGREEMENTS SUBJECT TO IT

The interpretation of private contracts that provide for arbitration is generally a question of state law. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). As a consequence, the question of who should pay the costs unique to arbitration of "unwaivable" state law claims, particularly when the parties' agreement is *silent* on the issue, is a matter of state law.[6] *Volt*, 489 U.S. at 476 ("There is no federal policy favoring arbitration under a certain set of procedural rules[.]") Review of the California Supreme Court's decision in *Little* is unwarranted because its holding is neither preempted by the FAA nor interferes with the enforcement of arbitration agreements subject to the FAA.

A. The FAA Does Not Preempt Application Of State Laws—Applicable To All Contracts—To Arbitration Agreements.

The FAA "contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477. Instead, the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or

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6. Of course, a state may not apply rules that hinder arbitration that would not be applied to private contracts in general. Such is not the case here.

in equity for the revocation of any contract." 9 U.S.C. § 2. "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [9 U.S.C.] § 2." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

In applying the FAA to the arbitration of federal statutory claims, this Court has been careful to note that, "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 26 (1991), *quoting from Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). "'So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'" *Gilmer*, 500 U.S. at 28, *quoting from Mitsubishi Motors*, 473 U.S. at 637.

Little is consistent with these principles.

B. *Little* Properly Applied California Law—Applicable To All Contracts—To Determine Who Should Pay The Costs Unique To Arbitration Of "Unwaivable Claims" Under An Adhesive Contract

The court in *Little* did not invalidate the parties' arbitration agreement, as written; the court enforced it without inferring a procedural structure that would have been unconscionable under state law generally applied to all contracts. "One such long-standing ground for refusing to enforce a contractual term is that it would force a party to

forgo unwaivable public rights[.]" *Little*, 29 Cal.4th at 1079. California's protection of unwaivable rights is applied to contracts beyond those compelling arbitration. *Baker Pacific Corporation v. Suttles*, 220 Cal.App.3d 1148, 269 Cal.Rptr. 709 (1990) (mandatory employee waiver of all employer liability for asbestos exposure void as against public policy); *Neubauer v. Goldfarb*, 108 Cal.App.4th 47, 133 Cal.Rptr.2d 218 (2003) (waiver of corporate directors' and majority shareholders' fiduciary duties to minority shareholders in close corporation void as against pubic policy); *Akin v. Business Title Corporation*, 264 Cal.App.2d 153, 70 Cal.Rptr. 287 (1968) (exculpatory clause which relieved escrow company of liability for its own ordinary negligence void against public policy).

In *Little*, the court applied the principles announced in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 6 P.3d 669 (2000) ("*Armendariz*") which involved arbitration of state statutory claims of discrimination under California's Fair Employment and Housing Act ("FEHA").[7]

> In Armendariz, we held that arbitration of claims under the FEHA is subject to certain minimal requirements: (1) the arbitration agreement may not limit damages normally available under the statute [citation omitted]; (2) there must be discovery sufficient to adequately arbitrate their statutory claim [citation omitted]; (3) there must be a written arbitration decision and judicial review sufficient to ensure the arbitrators comply

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7. Cal. *Government Code Anno.* §§ 12490, *et seq.* (Thomson-West 2003).

> with the requirements of the statute [citation omitted]; and (4) the employer must pay all types of costs that are unique to arbitration [citation omitted].
>
> These requirements were founded on the premise that certain statutory rights are unwaivable. This unwaivability derives from two statutes that are themselves derived from public policy. First, *Civil Code section* 1668 states: "All contracts which have as their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." "Agreements whose object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced." [Citation.] Second, *Civil Code section* 3513 states, "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." [Citations.]
>
> . . . .

Little, 29 Cal.4th at 1076-1077 (internal quotation marks denoting quotation from *Armendariz* omitted.)

In applying these principles to claims of wrongful termination in violation of public policy (labeled after *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 610 P.2d 1330 (1980)), the court in *Little* explained:

> A Tameny claim is almost by definition unwaivable. [The] public policy exception to the at-will employment rule must be based on policies

> carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions. . . . Thus, a legitimate Tameny claim is designed to protect a public interest and therefore cannot be contravened by private agreement. . . . Accordingly, because an employer cannot ask the employee to waive Tameny claims, it also cannot impose on the arbitration of these claims such burdens or procedural shortcomings as to preclude their vindication.

Little, 29 Cal.4th at 1077.

The decision in *Little* is consonant with California's principles of contract interpretation applied to all contracts in the state. As such, no provision of the FAA is contravened and no contracts subject to its proscriptions are improperly impaired.[8]

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8. Contrary to Auto Stiegler's argument (Petition at 20), *Little* does not present the specter of opening Pandora's Box to apply to "virtually any employment claim." The California Supreme Court has been scrupulous in limiting the scope of causes of action for wrongful termination in violation of public policy to such policies "tethered to fundamental policies that are delineated in constitutional or statutory provisions[.]" *Little*, 29 Cal.4th at 1077. *Green v. Ralee Engineering Co.*, 19 Cal.4th 66, 960 P.2d 1046 (1998) (administrative regulations implementing airline safety through the Federal Aviation Act of 1958 could be a source of fundamental public policy); *Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 876 P.2d 1022 (1994) (alleged whistleblowing as to violations of the company's internal operating practices did **not** violate fundamental public policy); *Jennings v. Marralle*, 8 Cal.4th 121, 876 P.2d 1074 (1994) (alleged age discrimination by company with fewer than five employees (therefore not covered by the FEHA) did **not** violate fundamental public policy).

II.

THE CALIFORNIA SUPREME COURT'S DECISION IN *LITTLE* DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *GREEN TREE*

In *Green Tree*, this Court was faced with making the determination of whether the imposition of the costs of arbitrating federal statutory claims could render an entire agreement unconscionable (a principle accepted by implication). The Court held that the party resisting arbitration bore the burden of proving that such fees would be an unacceptable impediment to the adjudication of statutory rights. *Green Tree*, 531 U.S. at 92. Finding an insufficient factual showing there, the Court reversed the court of appeals, holding that silence alone "does not render the agreement unenforceable." *Id.*, at 82. Nothing in *Little* conflicts with *Green Tree*.

First, the California Supreme Court enforced the arbitration agreement between Auto Stiegler and Little, just as the Court in *Green Tree* enforced the arbitration agreement at issue there. The *Little* court's bright line rule as to the allocation of costs unique to arbitration when state-protected "unwaivable rights" are involved expressly provides that such arbitration agreements are enforceable. As with any contract in California, arbitration agreements simply cannot be interpreted under state law to impair the right of an employee to vindicate "unwaivable rights" in an arbitral, instead of a judicial, forum.

> Armendariz and Green Tree agree on two fundamental tenets. First, silence about costs in an arbitration agreement is not grounds for

> denying a motion to compel arbitration. Second, arbitration costs can present significant barriers to the vindication of statutory rights.

Little, 29 Cal.4th at 1084.

Second, Auto Stiegler's argument (Petition at 15)—that *Little's* allocation of fees in adhesive predispute arbitration agreements violates the FAA because it burdens only employment arbitration contracts—focuses the lens backwards. California's protection of an employee's right to adjudicate "unwaivable claims" arises from California's general protection of unwaivable rights possessed by all California citizens when impacted by any private adhesive contract. *Baker Pacific Corporation*, 220 Cal.App.3d at 1157; *Neubauer*, 108 Cal.App.4th at 57; *Little*, 29 Cal.4th at 1084 ("[The cost-shifting analysis in *Armendariz*] is derived from state contract law principles regarding the unwaivability of certain public rights in the context of a contract of adhesion.").

> "[A] contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a 'take it or leave it' basis carries some consequences that extend beyond the orthodox implications." (*Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 269 [54 Cal.Rptr. 105, 419 P.2d 168].) Where the public interest is affected the exculpatory clause will be held invalid. (See *Tunkl v. Regents of the*

> *University of California, supra* (1963) 60 Cal.2d 92.) We hold that the exculpatory clause before us cannot relieve the escrow company from liability.

Akin, 264 Cal.App.2d at 159.

The only reason the court in *Armendariz* focused on "mandatory predispute employment arbitration agreements" is that only the *clause* that sought to impose the costs of arbitration of "unwaivable claims" on the weaker party (the employee) in an adhesive contract would be unconscionable. *Little*, 29 Cal.4th at 1080 ("[I]t is not the arbitration agreement itself but the imposition of arbitration forum costs that under certain circumstances violate state law.") Therefore, only those *clauses* in adhesive contracts entered into *before* the dispute arises (not employer/employee arbitration agreements as a whole) would be unenforceable under state law. *Little* does not impose a unique burden on employer/employee arbitration agreements.

III.

REVIEW OF *LITTLE* TO RESOLVE DIFFERENCES AMONG THE CIRCUITS IS UNNECESSARY BECAUSE THERE IS NO CONFLICT AS TO THE ENFORCEMENT OF ARBITRATION AGREEMENTS WITHOUT PROVISIONS FOUND UNCONSCIONABLE UNDER STATE LAWS APPLICABLE TO ALL CONTRACTS

Amicus curiae Employers Group proffers a false dichotomy among the federal circuit courts of appeals and California to contend that review of *Little* is appropriate to resolve a split among the courts. The dichotomy is illusory.

In every case cited by *Amicus* as following *Green Tree's* case-by-case approach, the issue to be decided was whether to invalidate the *entire* arbitration agreement, and refuse to compel arbitration, based upon the issue of the allocation of costs. Neither *Little*, nor those cases in which the arbitration agreements at issue were held to be unenforceable, is to the contrary. In those cases in which arbitration was not compelled, the agreements suffered from multiple infirmities that rendered them completely unconscionable, or a specific showing of financial hardship infringing on the ability of the specific party involved to arbitrate was shown. In short, there is no conflict over the essential holding in *Little*.

Amicus cites decisions from the Third and Fourth Circuits, and from district courts in the Second and Fifth Circuits as following *Green Tree*. *Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002); *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549 (4th Cir. 2001); *Mildworm v. Ashcroft*, 200 F. Supp.2d 171 (E.D.N.Y. 2002); *Boyd v. Town of Hayneville*, 144 F. Supp.2d 1272 (M.D.Ala. 2001). There are, of course, others as well. *Musnick v. King Motor Company of Fort Lauderdale*, 325 F.3d 1255 (11th Cir. 2003); *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88 (1st Cir. 2002); *Primerica Life Insurance Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002); *Burden v. Check Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001).

In each case cited above, however, the issue was the enforceability of the entire arbitration agreement, and the courts declined to invalidate the entire agreement absent a showing from the party resisting arbitration of the specific financial burdens that would have been imposed. All well and good.

In *Little*, the court also enforced the parties' arbitration agreement (silent as to the allocation of fees), and acted to safeguard the "unwaivable rights" of the weaker party by ensuring that an unconscionable provision for the allocation of fees did not interfere with the adjudication of those rights. Such an approach—excising an unconscionable contractual provision and enforcing the rest of the agreement—is consistent with the approach accepted by federal courts as well, and is not inconsistent with *Green Tree*. *Spinetti v. Service Corp. International and Service Corp. of Pennsylvania*, 324 F.3d 212 (3d Cir. 2003) (provision that each party pay its own attorneys' fees and split the costs of arbitration, regardless of the outcome, held unconscionable but severable, arbitration compelled under *Green Tree*); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001) (clause forbidding the award of punitive damages severed, arbitration compelled).[9]

On the other hand, *Amicus'* citation to *Circuit City v. Adams*, 279 F.3d 889 (9th Cir. 2002), *cert den.*, 535 U.S. 1112 (2002), and *Ingle v. Circuit City*, 328 F.3d 1165 (9th Cir. 2003)

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9. *Amicus'* citation to *Brown v. Wheat First Securities, Inc.*, 257 F.3d 821 (D.C.Cir. 2001) does not compel a different conclusion. True, as observed in *Little*, *Brown* and *Little* disagree on the extent to which state law can apply to arbitration agreements subject to the FAA. *Little*, 29 Cal.4th at 1078. However, the difference may be explained in the difference between the more amorphous "public policy" claims in the District of Columbia—which *Brown* could not easily define—with the concept of "unwaivable rights" arising from state law in California, and carefully circumscribed by California's highest court. *Green*, 19 Cal.4th at 79. Attempts to infringe upon those rights by contract are proscribed by California's statutes and unconscionable. At all events, any differences in the approaches of *Little* and *Brown*, based upon different statutory schemes, hardly require resolution by this Court.

does not establish a split among the courts. In both cases, the Ninth Circuit found far more pervasively unconscionable aspects to the Circuit City agreements than the cost sharing provisions. *Circuit City*, 279 F.3d at 896 ("[T]he objectionable provisions pervade the entire contract. In addition to the damages limitation and the fee-sharing scheme, the unilateral aspect of the DRA runs throughout the agreement and defines the scope of the matters that are covered."); *Ingle*, 328 F.3d at 1180 (same).

Finally, Amicus' reliance on *Ball v. SFX Broadcasting, Inc.*, 165 F. Supp.2d 230 (N.D.N.Y. 2001) and *Cooper v. MRM Investment Co.*, 199 F. Supp.2d (M.D. Tenn. 2002) to establish a split is also misplaced. In both, the parties resisting arbitration made sufficient factual showings under *Green Tree*. *Ball*, 165 F. Supp.2d at 240 ("[R]egardless of whether or not a per se rule is adopted in this case, Christopher has made a showing that she cannot afford to pay the fees imposed under the arbitration agreement."); *Cooper*, 199 F.Supp.2d at 781 ("In this case. Plaintiff's affidavit convinces the Court that she will be unable to pay the high costs of arbitration.")

CONCLUSION

There is no "deep and mature"[10] conflict as to the basic holding of *Little*. *Little's* bright line rule neither violates the FAA, nor the fundamental holding in *Green Tree*. For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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10. Brief of Employers Group at 5.

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In The

Supreme Court of the United States

AUTO STIEGLER, INC.,

Petitioner,

v.

ALEXANDER M. LITTLE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Arbitration Act ("FAA") preempts the Supreme Court of California's holding that an employer must pay all arbitration forum costs in matters involving state law claims of wrongful termination in violation of public policy.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Employers Group, formerly known as Merchants Manufacturers Association and Federated Employers, is one of the nation's oldest and largest human resources management associations. Headquartered in California, it represents nearly 5,000 companies of all sizes and in every industry, employing in the aggregate approximately 2.5 million employees.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, the Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases like this one. For this reason, the Employers Group has been involved as *amicus* in many significant employment cases, including *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1999); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); and *Chevron U.S.A. v. Echazabal*, 536 U.S. 73 (2002).

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. The letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of this Court, the *amicus curiae* states that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus curiae*, made a monetary contribution for the preparation or submission of this brief.

STATEMENT OF THE CASE

Respondent Little worked for Petitioner Auto Stiegler, Inc., an automobile dealership. He was terminated and subsequently filed suit for, *inter alia*, tortious wrongful termination in violation of public policy.

Little agreed to binding arbitration while employed by Auto Stiegler. The agreement was silent as to who would bear the costs of arbitration. The California Arbitration Act (the "CAA") provides that the parties will share the costs of arbitration unless they expressly agree otherwise. Cal. Code Civ. Proc. § 1284.2 (West 2003). Thus, by statute, the agreement provided that the parties would share arbitration costs.

Auto Stiegler's initial motion to compel arbitration was granted. Following the decision of the California Supreme Court in *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000), which held, among other things, that an employer must bear the costs of arbitration of a statutory discrimination claim, Little filed a request for reconsideration. On the motion for reconsideration, the trial court denied the motion to compel arbitration. Among the reasons the trial court gave for denying the motion was that sharing arbitration forum costs conflicted with the *Armendariz* decision. The Court of Appeals reversed, concluding in part that under this Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), silence as to who would bear the costs of arbitration was not a basis for invalidating the agreement. The California Supreme Court granted review, reversed the Court of Appeals and held that an employer must pay all arbitration forum costs in matters involving state law claims of wrongful termination in

violation of public policy. *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064 (2003).

SUMMARY OF THE ARGUMENT

As the nation's oldest and largest human resources management association, the Employers Group is vitally concerned that judicial antagonism towards employment arbitration claims does not result in courts rewriting employment arbitration agreements or imposing conditions on some employment arbitration claims which are not imposed on all arbitration claims.

There is a clear-cut Congressional policy in favor of enforcing, as written, the terms of all arbitration agreements. This policy is incorporated into the FAA. The FAA provides that arbitration agreements are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (West 2003). Congress enacted the FAA "to assure those who desired arbitration . . . that their expectations would not be undermined . . . [in the] courts." *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984).

The Supreme Court of California in this case holds that regardless of the agreement of the parties and the requirements of the state's arbitration act, every employment arbitration agreement contains an implied provision requiring employers to pay for all costs of arbitration of claims of wrongful termination in violation of public policy. This rule violates the FAA because it 1) does not enforce the agreement as written, by applying the statutory default rule, and 2) imposes a different rule on some arbitration claims which is not imposed on other claims.

The Supreme Court of California's decision is contrary to this Court's decision in *Volt Info. Scis., Inc. v. Board of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 475-79 (1989) that private agreements to arbitrate must be enforced according to their terms, and its decision in *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) that courts may not place any restrictions on arbitration agreements that are not also placed on all other contracts.

There is a deep and mature conflict between various courts as to whether a court can impose on some types of arbitration claims a "one party pays all" rule for the costs of arbitration. The District of Columbia Circuit Court of Appeals has imposed an "employer pays all costs" rule on statutory employment discrimination claims but refused to impose such a rule on wrongful termination in violation of public policy claims. The California Supreme Court, the Ninth Circuit Court of Appeals and District Courts for Tennessee and New York have imposed a "one party pays all" rule for some types of arbitration claims. However, the Third and Fourth Circuit Courts of Appeals have rejected a categorical rule imposing a "one party pays all" rule for arbitration costs and found that such a rule violates the FAA by changing the written terms of arbitration agreements. This split among the courts has resulted in confusion for multi-state employers and their employees whose arbitration agreements may be enforceable as written for one type of claim but not another and enforceable in one court but not in another.

I. THE DECISION BELOW IMPLICATES A DEEP AND MATURE CONFLICT ON THE QUESTION OF WHETHER THE FEDERAL ARBITRATION ACT PERMITS A COURT TO IMPOSE A CATEGORICAL "ONE PARTY PAYS ALL" RULE ON SOME TYPES OF ARBITRATION CLAIMS.

Section 2 of the FAA provides that arbitration agreements subject to the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, Congress's goal in enacting the FAA was to overcome deep-seated judicial hostility to arbitration and thereby allow private parties to choose to resolve their disputes through arbitration rather than litigation. *See, e.g., Volt*, 489 U.S. at 478; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). Specifically, the FAA permits private parties to "'trade[ ] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The decision of the Supreme Court of California in this case finds that every employment arbitration agreement contains an implied agreement that the employer must pay all costs of arbitration for claims of wrongful termination in violation of public policy. The court's decision violates the FAA by 1) in effect rewriting the agreement between the parties by implying a condition that the employer pay the costs of arbitration; and 2) singling out one type of arbitration claim for a rule which does not apply to other types of arbitration claims.

A. THE CALIFORNIA SUPREME COURT'S DECISION IS DIRECTLY CONTRARY TO THE BASIC PRINCIPLE OF THE FEDERAL ARBITRATION ACT THAT COURTS MAY NOT REWRITE ARBITRATION AGREEMENTS.

A basic Congressional goal in the FAA is the principle that such agreements may not be rewritten by the courts. Rather, state and federal courts must " 'rigorously enforce' such agreements according to their terms." *Volt*, 489 U.S. at 479 (quoting *Dean Witter*, 470 U.S. at 221). Indeed, this Court repeatedly has explained that "the central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.' " *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, 489 U.S. at 479), *Doctor's Assocs.*, 517 U.S. at 688 (enforcement of agreement according to terms is "the very purpose of the Act"); *Volt*, 489 U.S. at 476 ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20 (1983) (footnote omitted). The "basic objective" under the FAA is "to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (citations and internal quotation marks omitted).

The agreement here is silent as to costs. The CAA provides that in arbitration the parties will share costs unless they expressly agree otherwise. Cal. Code Civ. Proc. § 1284.2 (West 2003). Thus, by statute, each party is required to pay a *pro rata* share of the arbitration costs. Instead of applying this rule, the California Supreme

Court held that "an arbitration agreement to arbitrate a claim of wrongful termination contrary to public policy must be interpreted to implicitly include an agreement to proportion costs in a manner that is reasonable for the employee/claimant." *Little*, 29 Cal. 4th at 1081. Thus, in fact, the Court has rewritten every employment arbitration agreement in the State of California, whether the agreement provides for the allegation of costs or not, to require the employer to pay all costs for wrongful termination in violation of public policy claims. By imposing an "employer pays all rule" on all employment arbitration agreements, the California Supreme Court has rewritten not only the agreement in this case, but all California arbitration agreements in violation of the FAA.

This Court's decisions make clear that the FAA preempts state law that conflicts with the purposes of the FAA. *Southland Corp.*, 465 U.S. at 12-15; *Doctor's Assocs.*, 517 U.S. at 685. "[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476. That policy, which is designed to combat long-standing judicial hostility to arbitration by ensuring enforcement of the actual agreements entered into by the parties, has been confirmed repeatedly by this Court in cases reviewing state and federal court arbitration decisions. *Doctor's Assocs.*, 517 U.S. at 688; *Mastrobuono*, 514 U.S. at 53-54.

The California Supreme Court's imposition of a one party pays all rule "without any *contractual* . . . directive to do so," unquestionably constitutes an "intrusion upon the contractual aspects of the relationship," and therefore violates the "FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to

their terms." *Volt*, 489 U.S. at 475-79; *accord E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002); *Doctor's Assocs.*, 517 U.S. at 688; *Mastrobuono*, 514 U.S. at 54; *Dean Witter*, 470 U.S. at 221; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"); *id.* slip op. at 1 (Thomas, J., concurring in judgment) (noting *Volt* "held that under the [FAA] courts must enforce private agreements to arbitrate . . . in accordance with their terms").

B. THE SUPREME COURT OF CALIFORNIA'S DECISION VIOLATES THE FEDERAL ARBITRATION ACT BY PLACING CONSTRAINTS ON CERTAIN ARBITRATION CLAIMS WHICH ARE NOT PLACED ON OTHER ARBITRATION CLAIMS.

The FAA, 9 U.S.C. § 2, mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

This decision creates a special rule for one class of arbitration claims – wrongful termination in violation of public policy claims – in direct violation of the FAA. Other arbitration claims, for example employment arbitration claims for breach of express and implied contract, are not subject to the "employer pays all" rule.

The Supreme Court of California attempts to avoid the FAA's requirements by claiming that an employee has an implied-in-law unwaivable right to have the employer pay all costs of arbitration in wrongful termination of public policy claims:

> "Thus, while we recognize that a party compelled to arbitrate such rights does not waive them, but merely 'submits to their resolution in an arbitral, rather than a judicial, forum' (*Gilmer*, *supra*, 500 U.S. at p. 26), arbitration cannot be misused to accomplish a de facto waiver of these rights. Accordingly, although the *Armendariz* requirements specifically concern arbitration agreements, they do not do so out of a generalized mistrust of arbitration per se (see *Doctor's Associates, Inc.*, *supra*, 517 U.S. at p. 687), but from a recognition that *some* arbitration agreements and proceedings may harbor terms, conditions and practices that undermine the vindication of unwaivable rights. The *Armendariz* requirements are therefore applications of general state law contract principles regarding the unwaivability of public rights to the unique context of arbitration, and accordingly are not preempted by the FAA. And, as discussed above, there is no reason under *Armendariz*'s logic to distinguish between unwaivable statutory rights and unwaivable rights derived from common law."

Little, 29 Cal. 4th at 1079.

The Court, however, provides no support for this proposition, nor can it, since it is expressly contrary to California statutory law. The default rule for arbitration costs in California, if the agreement is silent, is that the parties share the expenses. Cal. Code Civ. Proc. § 1284.2. The California Supreme Court ignores the default rule and instead creates a new "unwaivable right" out of whole cloth. Not only is *pro rata* sharing of costs not a violation of an unwaivable right, it is the stated policy of California law.

It is clear that states may not place any constraints on some agreements to arbitrate which are not placed on all other contractual agreements. *See*, *Southland Corp.*, 465 U.S. 1; *Perry v. Thomas*, 482 U.S. 483 (1987). In this case, the California Supreme Court has created a rule which on its face can only apply to arbitration agreements. This Court has struck down state laws which only restrict arbitration agreements. In *Doctor's Assocs.*, 517 U.S. at 687, this Court stated:

> "Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. See *Allied-Bruce*, 513 U.S. at 281, 115 S.Ct., at 843; *Perry*, 482 U.S. at 492, n. 9, 107 S.Ct., at 2527, n. 9. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 2453, 41 L.Ed.2d 270 (1974) (internal quotation marks omitted). Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act. See 2 I. Macneil, R. Speidel, T. Stipanowich, & G. Shell, Federal Arbitration Law § 19.1.1, pp. 19:4-19:5 (1995) (under *Southland* and *Perry*, 'state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted')."

The Supreme Court of California's categorical rule cannot be justified as a legitimate application of equity law. There is no equitable right to have one party pay all arbitration costs. In fact, this Court recently held in *Green Tree*, 531 U.S. at 92, that a plaintiff seeking to invalidate an arbitration agreement on the grounds she could not afford the cost has the burden of demonstrating that the arbitration would be "prohibitively expensive." It is only the California Supreme Court's hostility to employment arbitration which makes sharing of cost a violation of an unwaivable equitable right.

Congress passed the FAA to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Volt,* 489 U.S. at 474. In the FAA, Congress recognized "the widespread unwillingness of state courts to enforce arbitration agreements." *Southland Corp.*, 465 U.S. at 13. By singling out one type of arbitration claim and applying a special rule which does not apply to all arbitration claims, the California court's decision violates the FAA's mandate that states may not place constraints on arbitration agreements which are not placed on all types of contracts.

II. IN SPITE OF THE CLEAR LANGUAGE OF THE FEDERAL ARBITRATION ACT AND THE DECISIONS OF THIS COURT, THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEALS, THE DISTRICT COURTS AND THE CALIFORNIA SUPREME COURT IN REGARD TO WHETHER COURTS MAY IMPOSE A CATEGORICAL "ONE PARTY PAYS ALL" RULE WHICH ONLY APPLIES TO SOME TYPES OF ARBITRATION CLAIMS.

State and federal courts have split on whether a court can mandate a "one party pays all" rule for arbitration costs in some types of claims or whether they have to consider each case based upon its own merits.

A. THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS HAS IMPOSED AN "EMPLOYER PAYS ALL" RULE IN THE CASE OF STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS, BUT REFUSED TO IMPOSE AN "EMPLOYER PAYS ALL" RULE IN THE CASE OF WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY CLAIMS.

In *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (CADC 1997), decided before this Court's decision in *Green Tree*, the D.C. Circuit imposed an "employer pays all" rule, holding that "an employee can never be required . . . to pay an arbitrator's compensation in order to secure the resolution of statutory claims." *Id.* at 1468. The court wrote that there was "no reason to think that the [U.S. Supreme] Court would have approved arbitration in the absence of [an arrangement that employers pay all costs of arbitration]." *Id.* at 1484.

After *Green Tree*, the D.C. Circuit in *Brown v. Wheat First Securities, Inc.*, 257 F.3d 821 (D.C. Cir. 2001), faced a common law claim virtually identical to the issue here. While not ruling directly on whether *Green Tree* overruled *Cole*, the court refused to create an "employer pays all" rule in cases of wrongful termination in violation of public policy. The court reasoned that, even assuming *Cole* was still good law, arguments in favor of extending the "employer pays all" rule must still fail. *Id.* at 824. The court said if the public policy rationale were used to create an exception to the FAA,

> "it is hard to see what falls outside it. All claims not based on contract . . . implement values that society has in one way or another thought deserving. . . . In short, the proposed extension of *Cole* [to violation of public policy claims] would significantly alter the terms of the Federal Arbitration Act, imposing a serious procedural limit on a wide (but unpredictable) range of arbitration claims, all without the slightest signal from Congress."

Id. at 826.

B. THE THIRD AND THE FOURTH CIRCUIT COURTS OF APPEALS, THE FEDERAL DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK AND THE FEDERAL DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA HAVE REFUSED TO ADOPT A BLANKET RULE REQUIRING ONE PARTY TO PAY ALL COSTS OF ARBITRATION AND INSTEAD HAVE REQUIRED COURTS TO REVIEW EACH CASE ON ITS FACTS.

In *Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002), an employee alleged sexual harassment and discrimination. The employee tried to set aside the arbitration agreement she had signed, asking the Third Circuit Court of Appeals to find that "the mere existence of a fee-splitting provision in an [arbitration] agreement" satisfied the showing of "prohibitive costs" required by *Green Tree*. *Id.* at 610. The court refused to do so, rejecting an "employer pays all costs" rule and instead requiring review of the case on its facts. The court reasoned that to do otherwise "would be inconsistent with *Green Tree* and would run counter to the strong federal preference for arbitration and the liberal policy regarding arbitration." *Id.*

In *Bradford v. Rockwell Semiconductor Systems Inc.*, 238 F.3d 549 (4th Cir. 2001), the Fourth Circuit Court of Appeals also supported the review of each case on its facts. An employee alleged age discrimination and sought to avoid the arbitration agreement he had signed, claiming that the agreement's fee-splitting provision should automatically render the agreement unenforceable. Rather than adopting an "employer pays all" rule as the employee urged, the Fourth Circuit required a "case-by-case analysis that focuses, among other things, upon the claimant's

ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether the cost differential is so substantial as to deter the bringing of claims." *Id.* at 556.

Similarly, the Federal District Court for the Eastern District of New York, in *Mildworm v. Ashcroft*, 200 F. Supp. 2d 171 (E.D.N.Y. 2002), concluded that, "based on *Green Tree*, the appropriate inquiry requires a case-by-case determination" rather than a blanket rule imposing costs on one party. *Id.* at 179.

The Federal District Court for the Middle District of Alabama held the same in *Boyd v. Town of Hayneville*, 144 F. Supp. 2d 1272 (M.D. Ala. 2001), noting that, in the absence of any binding authority from the Eleventh Circuit, the "court believes that the more prudent course, given the Supreme Court's recent decision in [*Green Tree*], is to follow the lead of those circuit courts which have declined to adopt [the 'employer pays all' rule]." *Id.* at 1280.

C. THE CALIFORNIA SUPREME COURT, THE NINTH CIRCUIT COURT OF APPEALS, THE FEDERAL DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AND THE FEDERAL DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK HAVE IMPOSED A BLANKET RULE THAT ONE PARTY MUST PAY ALL COSTS OF ARBITRATION FOR SOME TYPES OF CLAIMS.

In this case, the Supreme Court of California imposed a blanket "employer pays all" rule on the arbitration of all

terminations in violation of public policy arbitration claims. The Court relied upon its earlier decision in *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000) which held that any agreement to arbitrate employment discrimination claims must meet certain minimum standards to be enforceable. One of those requirements is that the employer must pay all costs of the arbitration. In relying upon that case, the court said,

> "We recognize that 'in enacting §2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' The object of the *Armendariz* requirements, however, is not to compel the substitution of adjudication for arbitration, but rather to ensure minimum standards of fairness so that employees subject to mandatory arbitration agreements can vindicate their public rights in an arbitral forum.
>
> "Specifically with regard to arbitration costs at issue in this case and in *Brown* the principle that arbitration costs may prevent arbitration claimants from effectively pursing their public rights would apply with equal force to [wrongful termination in violation of public policy] . . . claims as to [employment discrimination] . . . claims or to federal statutory claims. Nothing in the FAA prevents states from controlling arbitration costs imposed by adhesive contracts so that the remedy of prosecuting state statutory or common law public rights through arbitration is not rendered illusory. The *Armendariz* costshifting requirement is unique to arbitration only to the extent

> that arbitration, alone among contract provisions, may potentially require litigants to expend large sums to pay for the costs of hearing that will decide his or her statutory other public rights. In other words it is not the arbitration agreement itself but the imposition of arbitration costs that under certain circumstances violate state law."

Little, 29 Cal. 4th at 1080 (citations deleted).

In *Circuit City Stores v. Adams*, 279 F.3d 889 (9th Cir. 2002), the Ninth Circuit Court of Appeals held that an agreement requiring arbitration of sexual harassment, retaliation, constructive discharge, and intentional infliction of emotional distress claims was procedurally and substantively unconscionable. Among the reasons the court relied upon was that the agreement required the employee to pay for the costs of arbitration. The Ninth Circuit said "The [arbitration agreement] . . . also requires the employee to split the arbitrator's fees with Circuit City. This fee allocation scheme alone would render an arbitration agreement unenforceable." *Id.* at 894.

In *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), the Ninth Circuit found that an arbitration agreement requiring an employee to arbitrate statutory discrimination claims was unconscionable for a number of reasons. One reason was the cost sharing provisions of the agreement; in that regard the court said:

> "By itself, the fact that an employee could be held liable for Circuit City's share of the arbitration costs should she fail to vindicate employment-related claims renders this provision substantively unconscionable. Combined with the fact that Circuit City's fee-splitting scheme would

> sanction charging even a successful litigant for her share of arbitration costs, this scheme blatantly offends basic principles of fairness. *See Ting*, 319 F.3d at 1151; *Armendariz*, 6 P.3d at 687-88, 24 Cal. 4th at 110-11. Because Circuit City's cost-splitting provision is harsh and unfair to employees seeking to arbitrate legal claims we conclude that it is substantively unconscionable."

Ingle, 328 F.3d at n.18.

The Federal District Court for the Northern District of New York held in *Ball v. SFX Broadcasting, Inc.*, 165 F. Supp. 2d 230 (N.D.N.Y. 2001), where an employee alleged discrimination on the basis of gender and pregnancy, that to avoid arbitration an employee need only "show a likelihood that he or she will be responsible for significant arbitrators fees, or other costs which would not be incurred in a judicial forum." *Id.* at 239.

The Federal District Court for the Middle District of Tennessee in *Cooper v. MRM Investment Company*, 199 F. Supp. 2d 771 (M.D. Tenn. 2002), where an employee alleged sexual harassment and constructive discharge, similarly allowed an employee to avoid arbitration. The court noted that employees "often cannot afford to pay the high costs of arbitration" and that this "might prevent [an employee] from being able to vindicate her federal statutory rights." *Id.* at 781-82. The court quoted with approval the language in *Ball* that "an employee need only show a likelihood that he or she will be responsible for significant costs . . . rather than focusing on that employee's specific financial situation." *Id.* at 781.

III. THE ISSUE OF WHETHER THE FEDERAL ARBITRATION ACT PERMITS STATE COURTS TO IMPOSE A "ONE PARTY PAYS ALL" RULE ON ONLY SOME ARBITRATION CLAIMS PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW.

Review by this Court of the decision of the Supreme Court of California is necessary to ensure the proper and uniform resolution of a recurring and important issue under the FAA that has generated a substantial conflict among federal and state appellate courts. Specifically, this case presents the question whether the FAA permits courts to impose a one party pays all rule on only some types of arbitration claims.

Where, as here, a court ruling conflicts with the express policy of Congress, as evidenced by the FAA, that ruling must be struck down just as if it were a state statute in conflict with a federal statute. Any other result would expose employers to the prospect of arbitration agreements being rewritten in various ways from circuit to circuit and state to state. The Court should hear this case in order to clarify this point and end the uncertainty. The question presented here is one of great practical importance. The division of authority has created great uncertainty for parties subject to arbitration agreements. Indeed, as lower courts have recognized, arbitration agreements often appear in form contracts that are employed or apply in more than one state. *Ingle*, 328 F.3d at 1171. As a result, a uniform national rule is essential to ensure that similar cases are resolved in the same way regardless of where the parties reside.

This Court has repeatedly acknowledged that the FAA's requirement that arbitration agreements be enforced according

to their terms is at the core of the FAA. *Volt* itself is a prime example of the Court applying this core FAA requirement in reviewing a decision of the California Court of Appeal. Specifically, this Court in *Volt* explained that ensuring enforcement of arbitration agreements according to their terms was the "federal policy" of the FAA, 489 U.S. at 476, "Congress' principal purpose" in enacting the FAA, *id.* at 478, and "the FAA's primary purpose," *id.* at 479. Similarly, in *Doctor's Associates, Inc. v. Casarotto*, this Court reviewed a decision of the Montana Supreme Court and stated that "the very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'" 517 U.S. at 688.

In short, there can be no doubt that the decision below presents a critical issue of great practical importance under the FAA, and that the acknowledged division on that question warrants further review by this Court.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully asks this Court to grant the Petition for Writ of Certiorari to the United States Supreme Court.

Respectfully submitted,

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